(31,407)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 684

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER,

vs.

FRED A. ELDER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1925

[fol. 1] **IN DISTRICT COURT OF STEELE COUNTY**

FRED A. ELDER, Plaintiff

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

SUMMONS

You, the above named defendant, are hereby summoned and required to answer the Complaint of the plaintiff in the above entitled action, a copy of which Complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscribers at their offices at 419 Metropolitan Bank Building, in the City of Minneapolis, County of Hennepin, and State of Minnesota, within twenty days from the service of this Sum-[fol. 2] mons upon you, exclusive of the date of such service; and if you fail to so serve a copy of your Answer to said Complaint upon the subscribers within the time aforesaid, the plaintiff will apply to the court for the relief demanded in said Complaint.

Dated this 30th day of October, 1923.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[fol. 3] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

BILL OF COMPLAINT

Plaintiff for his complaint against the defendant in the above entitled cause alleges and states to the Court:

1st. That the defendant is now and during all the times hereinafter mentioned was a corporation engaged in owning and operating a steam railroad in and through the States of Minnesota, Iowa and Illinois, and as a common carrier by railroad in transporting both passengers and freight in interstate commerce.

2nd. That on and previous to the 13th day of February, 1923, the plaintiff was engaged in the service of the defendant as a servant and employe and as a brakeman, and it was a part of his duties to be on and about the engines and trains of the defendant.

3rd. That on the said February 4, 1923, in the line of his duty and in the course of his employment he was acting as a brakeman on one of the trains of the defendant running into and through the

[fol. 4] town of Pershing, Iowa, and that at about the hour of 12:20 P. M. acting in the line of duty he was in, around and about a caboose of said train; that while he was so working the defendant, its agents, servants and agents wilfully, wantonly, negligently, carelessly and recklessly ran a locomotive with a train of cars attached thereto into and against the train upon which the plaintiff was so working with great force and violence, derailing the said caboose and causing great injuries to the head, back, body and limbs of the plaintiff.

4th. That all the times herein mentioned the defendant was an interstate carrier and was engaged in interstate commerce; and that decedent was employed by the defendant as its servant and employe, and as such was working and engaged in in interstate commerce at the time of receiving the injuries herein set forth.

5th. That the defendant, its servants, agents and employes knew or in the use of reasonable care could have known that the plaintiff was in and about said caboose, and that the said caboose was upon the line and track over which said locomotive and train was being operated, but that the defendant, its agents, servants and employes failed to exercise any reasonable care to prevent running said locomotive and train into said caboose and injuring the plaintiff, and neglected and failed to give the plaintiff any notice or warning of the fact that said locomotive and train was being operated at a high and dangerous rate of speed over the track upon which the said caboose was located and that there was danger of a collision.

[fol. 5] 6th. That at the time the plaintiff was so injured he was a vigorous and strong man capable of earning and was earning the sum of approximately $300 a month, but that as the result of the wrongful acts of the defendant he was rendered permanently and totally disabled from performing any physical work or engaging in any occupation requiring physical effort and his earning capacity has been greatly reduced; that by the wrongful acts of the defendant he was caused to suffer great pain and anguish and his suffering will permanently continue; that by said wrongful acts he was further caused to sustain a great nervous shock and his health has been greatly broken down; that further by reason of said wrongful acts of the defendant he has been put to large expense for care, medical and surgical treatment and will be continuously put to further expense of like character in the future.

7th. That as a result of the injuries so sustained by and through the reckless, careless, negligent and wilful acts of the defendant as hereinbefore set forth the plaintiff has sustained damages in the sum of $50,000.

8th. Wherefore plaintiff prays for judgment against the defendant in the sum of $50,000 damages together with his costs and disbursements.

Davis & Mitchell, Attorneys for the Plaintiff, 419 Metropolitan Bank Building, Minneapolis, Minnesota.

[fol. 6] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

ANSWER

Answering plaintiff's complaint, defendant admits that it was and is a railroad corporation organized under the laws of the States of Illinois and Iowa and that it operated a line of railroad through the States of Illinois, Iowa, Minnesota, and other states, and that it was a common carrier of freight and passengers. Defendant also admits that on or about February 4, 1923, while plaintiff was in the employ of this defendant near the Village of Pershing, Iowa, he received certain personal injuries, the extent of which are to this defendant unknown. All other allegations in the complaint contained, defendant denies in whole and in part.

Further answering, defendant avers that said plaintiff's injuries were due to his own neglect and want of care and that such neglect and want of care contributed thereto and that on and prior to February 4th, 1923, plaintiff assumed the risk of his injuries.

[fol. 7] Further answering, defendant specifically denies that plaintiff was at the time of his injuries engaged in interstate commerce. On the contrary, defendant avers that plaintiff was at the time he received said injuries engaged and employed by this defendant whol-y in moving traffic within the state of Iowa, and that at said time he was engaged wholly in intrastate commerce.

Further answering, defendant avers that plaintiff at the time of his injury was a resident of the State of Iowa and that his aforesaid employment was referrable to the laws of the State of Iowa and that said contrat of employment was to be performed therein and all of the duties and liabilities of the parties were at all times during the term of his said employment governed and controlled by said laws of the State of Iowa and said contract of employment was made and performed in contemplation of the application of said laws to said contract of employment.

Further answering, defendant avers that at the time of said injuries to said plaintiff there were in full force and effect certain public statutes or laws of the State of Iowa duly enacted by the law making body of said State, to-wit: The General Assembly thereof and duly approved by the Governor of said State, the same being Title XII, Chapter 8-A, Supplement to the Code of 1913, as amended, by the 37th and 38th General Assemblies and hereinafter in this answer referred to as the Workmen's Compensation Law of the State of Iowa, as the same existed on February 4th, 1923, and for a long time prior thereto, is specifically referred to and made a part hereof as though fully set forth at length.

[fol. 8] Further answering, defendant avers that both defendant and plaintiff, in compliance with the terms and conditions of the Workmen's Compensation Act have elected to be bound by the terms thereof, and that the rights and obligations of the parties are determined by said Workmen's Compensation Law and not otherwise,

and that plaintiff should be entitled to recover only the damages provided in said act and not otherwise, in proceedings brought thereunder in the State of Iowa before the Industrial Commission of said state.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the within Answer admitted this 19th day of November, 1923.

It is stipulated that the Workmen's Compensation Law of Iowa is properly pleaded with the same force and effect as though set out verbatim in said Answer.

Davis & Michel, Attorneys for Plaintiff.

[fol. 9] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

REPLY—November 19, 1923

Plaintiff, for his reply to the answer of the defendant in the above entitled action, alleges and shows to this Court:

Plaintiff denies each and every allegation and each and every part thereof in said answer contained, except as the same admits the allegations contained in plaintiff's complaint.

Wherefore, plaintiff demands judgment as prayed for in said complaint.

Davis & Michel, Attorneys for Plaintiff, 419 Metropolitan Bank Building, Minneapolis, Minnesota.

[fol. 10] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

Supplemental Answer

For supplemental answer to plaintiff's complaint herein, the defendant avers that at and during all of the times herein after mentioned and referred to, one A. B. Funk was and still is the duly qualified Industrial Commissioner of the State of Iowa, as provided in the Workmen's Compensation Act of the State of Iowa, as alleged in defendant's answer.

On or about January 7th, 1924, the defendant and the plaintiff having failed to reach an agreement in regard to the compensation

payable to the plaintiff under said Iowa Workmen's Compensation Act, the above named defendant did duly notify the Industrial Commissioner of the State of Iowa of such fact, and did file with said Industrial Commissioner an application for arbitration as provided by said act.

The above named plaintiff was given due and personal notice of the filing of said application, and thereafter, and on or about January 11th, 1924, said plaintiff duly appeared and filed his plea in [fol. 11] abatement. Thereafter, on February 4th, 1924, said plea in abatement was duly overruled, and said matter set for hearing for February 11th, 1924, and thereupon, and on said February 11th, 1924, the above named plaintiff personally appeared and filed his answer. That thereafter by stipulation duly made between the plaintiff and the defendant, the appointment of an arbitration committee was duly waived, and said matter, by stipulation of the parties, was duly submitted to Ralph Young, deputy industrial commissioner of the State of Iowa. At said hearing, both the plaintiff and the defendant duly appeared, and thereafter and upon a full hearing, said deputy industrial commissioner of the State of Iowa, on February 13th, 1924, duly filed his decision and findings, whereby it was determined:

"1. That in wreck occurring February 4, 1923, Fred Elder, respondent herein, sustained injuries arising out of and in the course of his employment as a freight brakeman by the Chicago, Rock Island & Pacific Railway Company, applicant in this proceeding, such injuries causing the said Fred Elder to suffer disability.

"2. That at the time of the injuries in question the average weekly wage of the said Fred Elder exceeded $25.00.

"3. That at the time of the injuries in question the said Fred Elder was not engaged in interstate commerce so as to prohibit coverage of the case by the Iowa Workmen's Compensation Law.

"4. That the case is subject to adjustment under the Iowa Workmen's Compensation Law.

[fol. 12] Accordingly, the Chicago, Rock Island & Pacific Railway Company is hereby ordered to pay the said Fred Elder under the Iowa Workmen's Compensation Law at the rate of $15.00 a week during the period of total disability resulting from the injury in question, payments starting as of the date of the injury. The Chicago, Rock Island & Pacific Railway Company is also ordered to pay the costs of this hearing."

Said decision has never been reversed, modified or set aside, but on the contrary is in full force and effect.

The defendant pleads said proceedings before said Industrial Commissioner in the State of Iowa, as res adjudicata, and as a determination of the rights of the plaintiff and defendant in this cause, and avers the fact to be that said proceedings are public acts, records and judicial proceedings of the State of Iowa, and as such are entitled to

full faith and credit in this court, under Section II, Article IV of the Constitution of the United States.

Wherefore, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs and disbursements herein.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Endorsed: Due and personal service admitted February 19, 1924. Davis & Michel, Attorneys for Plaintiff.

[fol. 13] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

REPLY TO SUPPLEMENTAL ANSWER

Now comes the plaintiff and for his reply to the supplemental answer of defendant alleges and shows to this court:

1st. Plaintiff denies each and every allegation and each and every part thereof in said supplemental answer contained, except as is hereinafter admitted, qualified or explained.

2nd. Defendant admits that the Industrial Commissioner of the State of Iowa did make an order substantially as set forth in the supplemental answer herein, but plaintiff alleges that the Industrial Commissioner was without any authority to make such order in said proceeding and specifically alleges that plaintiff's rights are governed and controlled by the Employers' Liability Act of Congress.

[fol. 14] Plaintiff further avers that since the making of said order, a petition for review of the same has been filed in accordance with the procedure in matters before said commissioner, and that said petition for review of said order has not yet been passed on or determined by said commission, nor has any court in any way affirmed or confirmed the award so made by said commissioner.

Wherefore plaintiff demands judgment as prayed for in said complaint.

Dated this 20th day of February, 1924.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[fol. 15] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

Settled Case

CAPTION

It is hereby certified, that heretofore, to-wit, on the 1st day of March, A. D. 1924, the above entitled cause came on for trial and argument before the Hon. Fred W. Senn, District Judge, with a jury, at 2:15 p. m., in the court room, in the court house, in the City of Owatonna, in Steele County, Minnesota.

APPEARANCES OF COUNSEL

Messrs. Davis & Michel, St. Paul, Minnesota, and Messrs. Leach & Leach, Owatonna, Minnesota, appeared for the plaintiff.

Messrs. O'Brien, Horn & Stringer, St. Paul, Minnesota, and Mr. F. A. Alexander, Owatonna, Minnesota, appeared for the defendant.

And thereupon the following proceedings were had, viz:

[fol. 16] N. H. SCHELDROP, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Will you please state your full name?
A. N. H. Scheldrop.
Q. Where do you live?
A. Minneapolis.
Q. And what is your business?
A. Surgeon.
Q. Are you a duly licensed and practicing physician and surgeon in Minnesota?
A. I am.

Mr. Stringer: The doctor's qualifications are admitted, if you wish that admitted.

Mr. Davis: All right.

Q. Of what school are you a graduate?
A. Regular.
Q. And what college?
A. Rush Medical College.
Q. And how long have you been practicing your profession in Minnesota?
A. Twenty-six years.

Q. Have you as a physician and surgeon been in charge of any hospital in Minneapolis?

A. At the Fairview Hospital, Minneapolis.

Q. How long have you been in charge of the Fairview Hospital in Minneapolis?

A. Ever since it was built, about seven or eight years ago.

Q. And previous to that, what was your experience along surgical lines?

A. I was operating at the Swedish Hospital.

Q. And, Doctor, have you had any other experience?

[fol. 17] A. Yes, sir.

Q. What is it?

A. I had post-graduate work in Germany, France, and I had been associated with Professor Dunsmore of the State University about two years; I have been in the United States army.

Q. During the World War?

A. Yes.

Q. Now, during those times did you have experience in examining men and observing their condition with injured backs and suffering from concussion of the brain?

A. I have.

Q. And during your entire years' experience, in examining men who have suffered injuries of the spinal or the spinal vertebrae and also concussion of the brain?

A. I have.

Q. I wish you would give the jury just briefly the extent of your experience, that is, the number of operations a day you perform on the average?

A. Well, that is different. I usually operate from five to eighteen cases three times a week.

Q. Five to eighteen?

A. Yes.

Q. And there are all different kinds of surgical cases?

A. General surgery, yes, sir.

Q. And have you had in the years of your experience occasion to examine a good many men with injured spines?

A. I have.

Q. And during your experience have you had opportunity and occasion to examine X-rays taken of men's spines and other parts of their bodies?

[fol. 18] A. Yes. I use that as a part of my general equipment in the office as well as in the hospital.

Q. Now, Doctor, you are acquainted with Mr. Elder, the plaintiff?

A. I am.

Q. And I will ask you, have you at our request examined him about six months ago?

A. I did on the 28th day of September last year.

Q. And that was at the request of Davis and Michael, his attorneys?

A. Yes, sir.

Q. And when you examined him at that time, I wish you would state to the jury just generally what you did to examine him and what history of the case you obtained from him?

A. We gave him the——

Mr. Stringer: Well, now, of course, I suppose you are going to follow this up.

Mr. Davis: Yes, we are going to follow this up, with the understanding that the history of the case may be given. Well, I would say that the understanding was we should call him out of order and instead of assuming so and so I ask him the history of the case, which we will follow up by Mr. Elder to the same effect.

Mr. Stringer: Yes, with that understanding.

Mr. Davis:

Q. Now, if you will proceed and tell them what examination you made, together with the history of the case he gave you.

A. The procedure is, we take a history, a detailed history, typewritten on the regular history sheet. Then he is referred to the laboratory for lung findings and the urine analysis; then he is referred to an internalist, a man who practices internal medicine, [fol. 19] for the findings of the heart, lungs and stomach; and then he is referred to the X-ray laboratory for laboratory-findings, and practically the whole body is X-rayed; and then he is referred to me for the general examination, for the wind-up. From the examination, the history of the patient, the history he gave to me relating to the injury and how it happened and what took place afterwards, as far as he knew——

Q. Well, will you state that and relate to the jury?

A. Yes. The patient claimed that he was in a railroad wreck, one train ran into a caboose where he was sitting and that he was thrown out and that he was unconscious, was taken to a hospital and he was there between two and three days before he recognized anybody; he thought that he had been unconscious for quite a while, and when he begin to come to, he would remember that people had seen him and that he had called them by name, but he had no distinct recollection of anything that took place until after three days. The patient complained of a great deal of headache and soreness to his spine at the time, or immediately after the injury, and he also complained of a great deal of numbness and dizziness, particularly numbness over the left side and the left leg; he also complained of cuts and bruises and burns upon his body, in various parts of the body. The patient also stated that it took seven weeks before he could walk; that he was very nervous and restless and irritable; that he had considerable shooting pain running up through the back part of his head; that he was easily out of breath, and that he had pain through the left chest upon deep inspiration from taking a full breath. May I proceed with the examination?

[fol. 20] Q. Yes, Doctor.

A. Upon examination of the patient we found that he had a scar in the back part of his head in the hairy portion, the most prominent part of the head; we found that he had a scar over the right eye, outside of the eye, directly over the forehead, about three-quarters of an inch long; he had a scar over the small of his back,

one scar about an inch and a half long and very red; he also had several minor scars and burns or—they looked like that had been burns over the small of his back. The patient stated to me—I interrogated to say—that at the time of his injury he weighed 183 pounds; now he weighs 157 pounds. He has lost since the injury 26 pounds in weight. Upon examination, I found that he was very tender over the back bone, particularly over the small of the back, and also between the shoulder blades and down; I found that he was unable to bend down and touch the floor and straighten himself up without supporting himself, that is, when he got his hands on the floor and he tried to get up, he couldn't do it, he had to make use of his knees to work himself up; I find he couldn't bend backwards and he couldn't rotate his body very well from side to side, without considerable discomfort and pain; he was rather irritable, and when I examined him he perspired very freely and he turned pale on examination, as if he was under a severe nervous shock. The reflexes at first at the nervous system at that time were exaggerated; they were rather abnormally increased. At the present time his reflexes of the left side is markedly decreased and some of the reflexes are abolished. He complained at the time of the examination bitterly of headaches. The examination of his kidneys [fol. 21] were normal, and the examination of his blood was normal. The examination by the X-ray of his ribs showed that he had a fracture of the second and the third——

Mr. Stringer: Are you going to produce those X-rays?
Mr. Davis: Yes; we have them here.

A. And the fourth and the fifth, sixth, seventh and eighth rib, the back of the axiliary line, and the ribs had knitted, but they were overlapped in this fashion, one finger over the other (illustrating with fingers),——

Mr. Stringer:

Q. Pardon me, Doctor, I didn't get the number.
A. Second, third, fourth, fifth, sixth, seventh and eighth, on the left side. The examination of his spine reveals that he has a crushing fracture of the body, of the first lumbar vertebræ. That is the big, the first big vertebræ that goes from the lower part of the spine, just below the last rib. This fracture was irregular in contour and compressed. Do you wish for my diagnosis at the time?

Mr. Davis:

Q. Well, I think I would take that up in detail now. Now, that completes practically the first examination?
A. Yes.
Q. I believe yesterday, in conjunction with Doctor McIntyre, you again examined him?
A. This morning.
Q. And did you test his reflexes this morning?
A. I did.

Q. Now, Doctor, assuming that he was a man in good health at the time of his injury, and assuming he sustained the injury that you have related, and assuming that he is suffering from headaches [fol. 22] ever since the injury to persist and still suffers from those headaches, that he suffers from dizzy spells, and still is bothered with those dizzy spells, has suffered with shooting pains in the head, and still suffers with them, I will ask you if you can state to the jury, assuming that he was unconscious for the greater part of one or two days, what, in your opinion, would produce those headaches, shooting pains and dizzy spells?

A. I can state it.

Q. How?

A. Yes, I can state it.

Q. Will you so state to the jury?

A. He had, taking into consideration what Mr. Davis described, he evidently had a concussion or a shaking up of the brain substance; that is, the brain is within a thin skull, as you know, and the shock makes a certain jar that disorganizes the *she*lls of the brain and produces a great deal of traumatism, like a number of small lacerations and small hemorrhages into the brain tissue, as well as into the spinal cord.

Q. In your opinion, Doctor, at the time of the injury, taking into consideration the fact that he was unconscious in this wreck, you may state whether or not, in your opinion, he did suffer a concussion of the brain, as well as a concussion of the spinal cord?

A. To the best of my ability, I believe that he had a concussion of his brain and a concussion of the spinal cord.

Q. And in your opinion as a physician and surgeon, are you reasonably sure of that opinion?

A. That is my opinion.

Q. Doctor, in this case, from the X-rays—have you the X-rays with you?

[fol. 23] A. I have.

Q. Where are they? (Witness produces X-rays.)

A. Then here are several X-rays that—here is mostly that shows the spine.

(X-ray picture marked plaintiff's Exhibit 1.)

(X-ray picture marked plaintiff's Exhibit 2.)

Q. You have handed me a number of exhibits, some of which you have laid upon the table in front of the reporter and some of which you have handed me. I will ask you if those you have handed me contain—these are X-rays of his head and some of them duplicates of these?

A. They are.

Mr. Davis: If you wish to have those for cross examination, I will submit them to you.

(X-ray picture marked plaintiff's Exhibit 3.)

(X-ray picture marked plaintiff's Exhibit 4.)

(X-ray picture marked plaintiff's Exhibit 5.)

(X-ray picture marked plaintiff's Exhibit 6.)

Q. Now, Doctor Sheldrop, I am handing you Exhibits One to Six, and I wish you would take them in their order, chronologically, and state to the jury what each one shows with reference to the injuries of Mr. Elder—that Mr. Elder sustained?

A. Number one shows a crushing injury to the first lumbar vertebra, with an irregular articulating service above. Do you wish me to show this to the jury?

Q. If you will point out, yes.

A. This light is not very good, but here is a normal vertebra, there is another normal, here is the crushing injury to this one. You see, it is only about one-half the size. It is very hard for people [fol. 24] who are not trained in actual work to know the difference. Of course, they don't know what the normal one is like. But I think you can all see with the poor light that the difference from here to there is nowheres as great as from here to there; also, that this vertebra is clean-cut, above and below, whereas this one is irregular here.

Q. I will ask you this, Doctor, this space which is narrower between the two vertebra——

A. That is the crushing injury.

Q. That indicates the crushing injury to the first lumbar vertebra?

A. Yes.

Q. Very well. If you will take number two?

A. Number two is an X-ray of the upper part of the spine. It shows a bending of the spine laterally this way. This is straight. Whether that was due to the injury or not I don't know, as that happens very often that people haven't got a straight spine.

Q. Could the injury be one of its causes?

A. It could be.

Q. And is traumatism furnished because of curvature of the spine?

A. One of the causes; not so frequent.

Q. Number three?

A. Number three shows the fractures of the ribs. Now, if you compare them with the other side, you can see they are perfectly smooth here; here they overlap.

Q. Now, looking at exhibit three, at the rib which appears to be next to the top here, is that where the fracture appears?

A. Yes, that is the fracture.

Q. And going down on the exhibit three, will you point out where the fractures appear on each of the ribs?

[fol. 25] A. One after the other, (indicating).

Q. Number four?

A. Number four shows identically the same condition.

Q. As to the fracture of the ribs?

A. As to the fracture of the ribs.

Q. Number five?

A. Will I be permitted to explain?

Q. Yes.

A. When he came to me, he stated that at the hospital they had

taken an X-ray and he had a fracture of his pelvic bone, and for that reason——

Mr. Stringer: Are you claiming that, Mr. Davis?
Mr. Davis: I don't know. That is why I asked you if you have the X-rays here.
Mr. Stringer: Yes; I expect to have them here.

A. Now, I am unable to state whether he had a fracture there or not, for this reason, if he has had a fracture—this pelvic bone is a very broad bone and he might have had a fracture, and if it was healed, it probably wouldn't show. The only thing I find in this picture is a slight irregularity, about the sacral iliac joint but, whether this irregularity is due to the injury or not, I can't tell.

Mr. Davis:

Q. Asking you this, that is exhibit five, I expect, that is an X-ray of the pelvis, yes, and I have one here that is also an X-ray of the pelvis, I believe?
A. I think both are the same thing.

Mr. Davis: Do you wish us to introduce this one?
Mr. Stringer: Well, if you are claiming it.

(X-ray picture marked plaintiff's Exhibit 7).

Mr. Davis:

Q. Go ahead.
[fol. 26] A. Number six is an X-ray taken from the ribs down, from this, from the eighth rib down to the middle part of the pelvis. It shows the same irregularity of the pelvis.
Q. Now, Doctor, from your physical examination of Mr. Elder and the examinations and what you say is disclosed by the X-rays, that you have just testified to, I will ask you to state to the jury whether or not Mr. Elder has sustained a permanent injury to his spine?
A. From the—yes, he has sustained a permanent injury to the spine—to the spine.
Q. And this crushing fracture of the first lumbar vertebra, as shown by the X-ray, you may state whether or not that, in your opinion, that injury to the first lumbar is a permanent injury?
A. That is a permanent injury.
Q. And from your experience as a physician and surgeon, you may state whether or not that injury, in your opinion, will permanently incapacitate him from performing manual labor?
A. To the best of my ability, I believe that he will never be able to do any hard work.
Q. In other words, in your opinion, you may state to the jury whether or not he will be able to have the use of that spine and back in bending and working as a normal man.

Mr. Stringer: Objected to as leading.

Mr. Davis:

Q. State whether or not, in your opinion, he will be able to use his back in bending and working as a normal man would.

A. He would be able to be around and—well, I would have to modify that statement by certain other facts that comes into this case. Do you wish to confine myself entirely to this locality of injury?

[fol. 27] Q. Well, take into consideration the entire condition in which you found him as bearing upon the question of permanent injury to his spine.

A. Taking into consideration the general condition of the patient at this time, he is absolutely unable to do any manual labor whatsoever, and it is very doubtful that he will ever be able to do any manual labor.

Q. Upon what do you base that opinion, Doctor?

A. I base it upon the nature of the injury, the history of the case, my personal examination, my personal experience in those cases and upon the findings of such an examination.

Q. And do you also base it upon the length of time his incapacity has, since the injury——

Mr. Stringer: Objected to as very leading.

The Court: Objection sustained.

A. And also upon a finding, which was rather surprising to me and which I hadn't expected. When I first examined him, I found that the reflexes were abnormally increased, and today when I examined him I found that the reflexes were gone practically, some of them were very much less, and the babinsky reflexes of the foot was entirely gone, which shows and proves that the patient has a permanent injury of the spine.

Mr. Davis:

Q. That you are certain of, are you, Doctor?

A. Yes, sir.

Q. Now, Doctor, with reference to the ribs that were fractured, are those a permanent injury, or if they will ever return to their normal condition?

A. The ribs are a permanent injury, but from the fracture of the ribs he will suffer no bad result; it will not interfere with his working ability.

[fol. 28] Q. And with regard to the fact that he has lost weight from 183 to 157, when he was injured a year, what would that indicate as a physician to you?

A. That would indicate that his normal repair forces haven't gotten into operation and that his vitality is low.

Q. With reference to taking into consideration that when you first examined him in September his reflexes were exaggerated, that when you examined him today there were some of them diminished and some of them totally absent, I will ask you to state to the jury what that indicates to you as a physician and surgeon?

A. That indicates a lesion of the cord—the spinal cord.

Q. A lesion of the spinal cord?

A. Yes, sir.

Q. And in your opinion is that a permanent or temporary condition?

A. That I believe is permanent. Now, may I make a statement in connection with that?

Q. Yes, sir.

A. I perhaps should answer that—shouldn't say that without some modification. I would like to give the reason, of course. I don't want to be misunderstood.

Q. If you will, please.

A. There is certain condition which takes place in the spinal cord that although the lesion is permanent, through years of training you may train certain nerves back to perform part of that function, and in answer to Mr. Davis' question I couldn't say positively that but what he in course of time may train himself about certain function, but as far as any practical purpose is concerned, so far as any [fol. 29] manual labor is concerned, it is a permanent injury.

Q. Yes. Now, Doctor, with reference to his being out of breadth and pale and perspiring, what do those things indicate, please?

A. I think that is entirely due to psychoneurosis.

Q. Tell the jury what that means, if you please?

A. It is a form of change in the nervous condition of the brain whereby the nerve centers have become fatigued, or, rather, that the battery has become discharged and is not able to recharge itself. I believe that explains that better.

Q. And, Doctor, assuming that he has had continuous pain in his back and hips ever since the injury, I will ask you whether or not that would be an effect in determining the permanency of the injury?

A. Yes, it would.

Q. Assuming that he was unconscious and sustained a concussion of the brain, I will ask you whether or not, from your experience as a physician and surgeon, what effect, if any, such a concussion of the brain and the fact that he was unconscious for that length of time is likely to have upon him?

A. Mr. Davis, all brain injuries are a very hard to state what they are—ultimately may turn out to be. There are all kinds of possibilities,—they may either recover, they may be stationary, and it may go into a form of insanity.

Q. This evidence of unconsciousness for a considerable length of time, is that one of the evidence of a concussion of the brain?

A. Pardon me, I had another thing in mind to answer that [fol. 30] first question. You are a little too fast for me.

Q. All right.

A. There is also with that brain injury another aspect, and that is the well person itself, a man sometimes forgets who he is, he forgets his former life and he changes his habits; if he has been a man who was of a nice disposition, he becomes some times the op-

posite—ugly, irresponsible, irritable, vicious and uncontrolable, and vice versa. Now, if you will kindly ask me the——

Q. Doctor, when you examined him, you found him wearing a brace?

A. Yes, sir.

Q. And what was that brace put on there for?

A. For the purpose of relieving the pain of his spine and to support it.

Q. And you know both times you examined him he had that brace on?

A. All the times I have examined him, seven or eight times.

Q. And assuming that he was given that brace by their doctor, or one of the company doctors, you may state what the purpose of it would be?

A. For the purpose of relieving his pain on motion, and to support his spine.

Mr. Davis: I think that is all. You may take the witness.

Cross-examination.

Mr. Stringer:

Q. Doctor, you made these various examination for the purpose of testifying in this case, did you not?

[fol. 31] A. Well, I did not; I made it for Davis and Michel. I didn't know until——

Q. But you did not make your examination for the purpose of treating him?

A. No.

Q. You have never been employed for that purpose?

A. No.

Q. Now, so far as the concussion of the brain is concerned, as I understand, he has completely recovered from that?

A. No, he has not.

Q. He may; with brain injuries you can't tell what will happen?

A. That is true.

Q. But none of these things have happened that you say might happen? Now, just answer the question, Doctor?

A. Yes. I was just trying to get a suitable answer to that. He shows now a mental irritability. If I am permitted, I would like to explain what I mean by that.

Q. Well, now, I think we understand it. He is irritable, is that the idea?

A. Yes. I want to say that when I examined him this morning, I made a certain test and he began to cry. Now, a normal man wouldn't do that, and that shows that he still is suffering from the effect of the concussion of the brain.

Q. In other words, his nervous system has been affected by this accident?

A. Yes.

Q. That is the plain English of it?
A. Yes.
[fol. 32] Q. And, of course, you would expect that as things went on his nervous system would improve, wouldn't you?
A. I would like to see it improve. I expect it, yes; in many cases we expect it.
Q. Then you would expect it in this case?
A. Yes, I think it would.
Q. And, of course, the necessity of having a law suit and about to go into the trial of a case is wearing on a man's nerves, is it not?
A. Yes, that is true.
Q. The fact is there is such a well recognized disease among the medical profession as being induced by pending litigation?

Mr. Davis: Now, I don't get the question.

Mr. Stringer:

Q. Isn't there?

Mr. Davis: Let's get the question. I can't understand it. If you understand it, you may answer.

A. Well, I wouldn't say exactly. I know what you mean all right, and if I can answer it accordingly.

Mr. Stringer:

Q. But I didn't state it right?
A. Yes, you state all right, but you don't make a distinction between the—but I will answer it in this way,—no, there is no disease induced.
Q. A nervous condition brought about by it?
A. The nervous condition, the symptoms of nervousness, that is true.
Q. Are induced by the pending litigation?
A. Yes.
Q. When the litigation is over, you would expect that nervous condition to disappear largely?
A. Yes, quiet down considerably.
Q. So that in the course of time, as his mind would ease, you would expect most of these mental diseases to disappear?
[fol. 33] A. You mean—is this a hypothetical question or asking me about his case?
Q. No; I am asking you about his case.
A. I wouldn't say either way.
Q. Of course, you are not a nerve specialist, are you?
A. No, I am not.
Q. Now, the ribs, while they were crushed all right, no question about that, have knitted?
A. Yes.
Q. And while not perfectly, they cause him no discomfort?

A. They are overlapping and he says that he has pain there.

Q. Well, as far as you can say, they are perfectly good ribs?

A. Yes.

Q. And would not interfere with his manual labor?

A. No.

Q. Then as I understood you, the only thing that you think will interfere with manual labor, is this fracture of the vertebra?

A. I would like to make an additional, as long as we are talking about the rib, you asked me that question, and I would like to answer that fully. It is only this, that when you have had a fractured rib, or any fracture anywheres in the body, that if there is any rheumatism in the system afterwards it is apt to take place in this fracture rib. This manner he may have considerable pain.

Q. Well, nothing that would interfere, as far as his ribs are concerned, with manual labor, except as you have indicated?

A. That is all.

[fol. 34] Q. Now, you say there is a fracture of one of the vertebrae?

A. The first lumbar.

Q. What sort of a fracture is that?

A. That is a crushing injury, or what we call a compression fracture.

Q. Well, what does that mean, that it is cracked?

A. It means that the vertebra has been chipped off and driven in, compressed, squeezed.

Q. Now, there is only one of those vertebrae that is in any way injured?

A. Yes, sir.

Q. The pelvis, as far as you can say, is all right?

A. No, the pelvis isn't all right. There is a deformity of the sacral illiac joint, but I don't know whether that deformity was due to this injury or if it has existed prior to this injury.

Q. No way you could tell about that?

A. I couldn't tell.

Q. Nothing in the X-ray pictures to indicate?

A. Except that it is not normal on one side.

Q. Nothing in the nature of the injury that would lead you to believe that it had been?

A. Except his own statement that he did have a fracture there.

Q. If he did have a fracture, that fracture is——

A. Is healed up.

Q. Is healed up?

A. Yes, sir.

Q. And, of course, as far as may be concerned, the curvature of the spine, you are unable to tell whether that came from this injury or not?

A. Yes, I can't tell them.

[fol. 35] Q. A great many other people have curvature of the spine?

A. Yes; from sitting in school houses over a desk, or things of that kind.

Q. And that, as a rule, is not a very—is not a disabling defect at all?

A. No. There is only one reason why I thought it might have been due to this injury and that is that he has considerable tenderness on pressure over this particular area, so that it might have been caused by this injury.

Q. And that, of course, wouldn't lay him up?

A. I beg pardon?

Q. I say that, of course, wouldn't interfere with manual labor, that curvature of the spine?

A. No; it would not.

Q. The loss of weight that you refer to is a loss of weight that you will naturally expect of a man who had gone through and had an injury as severe as this, would you not?

A. No, Mr. Stringer; he may have loss of weight from the injury and from the confinement and the shock, but after—if he was a well man, he should recuperate; at his age, he should recuperate before this time. I mean he should be back to normal.

Q. Of course, he hasn't been able to do any work, as you understand it, during this past year?

A. Yes.

Q. In fact, remaining in the house would have a tendency to reduce weight, would it not?

A. That would have a tendency to increase weight.

Q. His kidneys were normal, were they not?

A. Yes. His blood was normal, too.

[fol. 36] Q. And his blood normal. His general health was fairly good, Doctor, was it not?

A. No, it is not good, no; his general health is bad.

Q. I think that is all.

Mr. Davis: That is all, Doctor.

The Court: We will take a recess until ten o'clock Monday morning.

(March 3, 1924, 10:00 a. m.)

SAMUEL WOODS, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Mr. Woods, state your name?

A. Sam Woods.

Q. Where do you live?

A. I live at Allerton, Iowa.

Q. Employed by the Rock Island Railroad?

A. Yes, sir.

Q. Were you employed at the time of this accident? You were so employed at the time of the accident?

A. Yes, sir.

Q. Now, as an engineer did you receive any orders shortly before the accident to go to Chariton?

A. Yes, sir.

Q. Have you that order, or a copy of it, with you?

A. Yes, sir.

Q. Will you produce it?

(Train order marked plaintiff's exhibit 8).

Q. Handing you Exhibit 8, you may look at it and state whether [fol. 37] or not that is an order, original of which you received while on your way into Chariton, shortly before the collision?

A. It is.

Q. Will you read that order?

Mr. Stringer: Well, just a minute. Do you offer it, or——

Mr. Davis: Why, yes, we offer it in evidence. Any objection?

Mr. Stringer: I don't know what it is.

Mr. Davis: You don't know what it is?

Mr. Stringer: Well, now, Mr. Davis, to shorten our record, we will admit that there was a collision on the way into Chariton and that it was due to the fault of the company.

Mr. Davis: Well, then, let's have the record, it is admitted, while the plaintiff was on his way into Chariton a collision occurred due to the negligence of the defendant and that such negligence was the fault of the defendant and that such negligence was in whole or in part the contributing and proximate cause of the *defendant.*

Mr. Stringer: Yes.

Mr. Davis: That is conceded. That is all, Mr. Woods.

Q. Just a moment, Mr. Woods. Mr. Woods, how long did you work on this particular work there, switching the mines?

A. Well, which do you mean, engineer or fireman?

Q. Either one or both.

A. Well, I had been in the neighborhood of around about four or five years.

Q. Now then near these mines there is what is known as Pershing Yard, is there not?

A. Yes.

[fol. 38] Q. And in that Pershing Yard there is two tracks and one is a storage track, and this one is known as number one, and one is known as number two?

Mr. Stringer: Well, your Honor, I think the question is extremely leading.

The Court: The questions are leading.

Mr. Davis: Is there any objection on that ground?

Mr. Stringer: Not to this particular question.

Mr. Davis: All right.

Q. Are care placed on number one, cars placed by you in switching on number one at the Pershing yard at times?

A. Yes, sir.

Q. And where do those cars go?
A. The cars on number one goes west.
Q. And the cars placed on number two——
A Goes east.
Q. In switching in those yards and taking cars out, you may state whether or not you take cars out, Mr. Woods, going into the state and out of the state?

Mr. Stringer: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.

Mr. Davis:

Q. You may answer.
A. As far as the movement of the cars, I know nothing of them.
Q. Do you know this, that when you switch cars in the mine and pull out, you pull out loads do you?
A. Yes, sir.
Q. And so far as you know, it doesn't make any difference whether the loads are going in or out of the state, you pull them all out of the mine?

Mr. Stringer: Objected to as leading.
The Court: Objection sustained.

[fol. 39] Mr. Davis:

Q. Do you know from the experience you have had in working for the Rock Island whether they pull a car out of that mine going out of the state?

Mr. Stringer: That is objected to as immaterial. The question gets down to what they were doing at the particular time; generally makes no difference. I object to any general questions as to what they had done. (Question read.)
The Court: The question is too broad, in the opinion of the Court.

Mr. Davis:

Q. Mr. Woods, going from the mines to the Pershing yards, how far is it?
A. To the furtherest mine, you mean? About eight miles.
Q. From the mines where you worked was it two and three?
A. About eight miles.
Q. Would those cars be hauled from two and three up to the Pershing yards?
A. They would.
Q. And placed on tracks one or two?
A. Yes, sir.
Q. Going from Pershing yards to Chariton, how would you get there?
A. By train orders.

Q. And what tracks would you use in going there?
A. Use the main line.
Q. The main line track?
A. Yes, sir.
Q. From Pershing yards west to Chariton?
A. Yes, sir.
Q. And is that the main line track upon which the cars run from Minneapolis to Kansas City?
A. It is.
[fol. 40] Q. Freight and passenger?
A. Yes, sir.
Q. Intrastate as well as interstate trains?

Mr. Stringer: Objected to as irrelevant and immaterial.
The Court: Overruled.

Mr. Davis:

Q. Intrastate as well as interstate trains run over that line or railroad?
A. Yes, sir.
Q. Is it the whole line of road connecting on which the Rock Island runs from Minneapolis to Kansas City?
A. It is to that point.
Q. And with reference to your running on that track and going to Chariton on that day in question, you may state to the jury whether or not you ran your train under orders with reference to the movement of those other trains, both intrastate and interstate?

Mr. Stringer: Objected to as irrelevant and immaterial, under my contention.
The Court: Overruled.
Mr. Stringer: Please add, irrelevant and immaterial and calling for the conclusion of the witness and speculative.
Mr. Davis: That is withdrawn. It may call for the conclusion of the witness.

Q. When you run those trains, did you have anything to do with going into Chariton that day, as well as other times, with reference to other trains that might be running on there, on the main line?
A. I don't quite get you question.
Q. Well, would your running of your train have anything to do [fol. 41] with the movement of it with reference to other trains that might be using the line?
A. Yes, sir.
Q. In what way?
A. Well, we would have to have time to go from Pershing yards into Chariton.
Q. Yes, I refer to the movement of other trains besides your own?
A. Yes.
Q. Would you run with any reference to them?

Mr. Stringer: That is objected to as irrelevant and immateral and speculative.
The Court: Overruled.
Mr. Stringer: Exception.

A. Yes.

Mr. Davis:

Q. Now, for instance, handing you exhibit eight again, that is an order that was given you with reference to the running of your engine and caboose?
A. Yes, sir.
Q. And it states here——

Mr. Stringer: Wait a minute.
Mr. Davis: We offer it in evidence.
Mr. Stringer: Well, I object to it, in view of my concession of negligence.
Mr. Davis: Well, we offer it on another issue entirely, showing that the other cars have come through.
Mr. Stringer: That is wholly immaterial, so far as interstate commerce is concerned.
The Court: Overruled.

Mr. Davis:

Q. Now, Mr. Woods, this reads as follows: I think I can read it—No. 912, engine unknown—is that right?
A. Yes, sir.
[fol. 42] Q. And all eastward extras wait at Chariton until 1:30 p. m.
A. Yes, sir.
Q. Now, that eastward extras wait at Chariton until 1:30 p. m., Chariton was west of where you were going?
A. Yes, sir.
Q. And this order would mean that all freight trains and passenger trains coming into Chariton——

Mr. Stringer: Objected to as leading.
The Court: Objection sustained.

Mr. Davis:

Q. What would that mean with reference to the trains that came into Chariton? I thought I would save a little time.

Mr. Stringer: I object to it as irrelevant and immaterial. And may the record show that I object to questions along this line and that I may have an exception to the court's ruling. Now, we have admitted for the purposes of this case that there was a collision and that it was due to the fault of the company. Now, with that concession, it is wholly immaterial what trains had departed or what trains had not departed.

The Court: As I understand it, however, that the question as to whether or not the plaintiff was engaged in interstate commerce at the time of the collision is in dispute.

Mr. Stringer: I object to that as wholly immaterial to that issue.

Mr. Davis: Our position is that if the train was run with reference to the safety of the other trains on the main line, it would be——

Mr. Stringer: I object to it on that ground.

The Court: I think on that question as to whether or not the [fol. 43] train in question here was run with reference to other trains that were engaged in interstate commerce wouldn't determine the question in this case as to whether or not the plaintiff was engaged in interstate commerce.

Mr. Davis: Well, I might make myself plain. If the plaintiff, as well as the conductor, had to run their train with reference to the safety of other trains on that main line, then the ultimate question is whether that at that time so far removed from the interstate work of the carrier and the safety of those persons is not a part of the interstate work of the carrier.

Mr. Stringer: I object to that as immaterial.

Mr. Davis: It may be admitted for the purpose of the record that generally speaking at the times involved, as well as other times, the Rock Island Railroad was a railroad engaged in intrastate as well as interstate commerce. We propose to show that he gets an order to run with reference to certain trains—extras—from the west, and let us assume that we follow that up and show that those extras from the west then were from outside of the state and their order is to run with reference to them. Can it be said, as a matter of law, that it is not an element to be considered by the jury ultimately upon a question of fact, if not of law by the court, of interstate commerce?

The Court: I think the question as to whether or not the plaintiff was moving with reference and in regard to interstate trains would not be an element on the question as to whether or not the plaintiff was engaged in interstate commerce, and I shall sustain the objection.

Mr. Davis: We offer to show by this witness, as well as other witnesses, that when the plaintiff ordered by the defendant company [fol. 44] to go upon the main line track and from Pershing yards to Chariton, Iowa, that it was part of the duty of the train crew, of which he was a part, to run said train, engine and caboose with reference and subject to the arrival and departure of interstate trains on the main line, and that before the conductor or engineer, their engine and caboose, could enter upon the main line, they would have to receive orders permitting them to enter the main line and go to Chariton, and that these orders necessarily would determine their right to go upon the main line by reason of the arrival or departure of interstate trains using the main line.

Mr. Stringer: Objected to as irrelevant and immaterial.

Mr. Davis: And also to show further by this witness that at the time they entered upon the main line there was at Chariton, Iowa, an interstate train which was delayed or waiting the arrival of this engine and caboose at Chariton before he could proceed on his inter-

state journey, and that the running of this engine and caboose caused this interstate train to be held up at Chariton, Iowa.

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Davis: That is all, Mr. Woods. Exception, please.

Myrtle Hanlon, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. If you will, kindly state your full name.

A. Myrtle Hanlon.

[fol. 45] Q. And you are employed by the Rock Island?

A. Yes, sir.

Q. And have been employed by them for some time?

A. Yes, sir; seven years.

Q. And I believe you were a witness at some hearing in Des Moines?

A. Yes, sir.

Q. And you are familiar with the custom and manner of handling of the business of the Rock Island at the mines, are you?

A. Yes, sir.

Q. And have been for a good many years last past?

A. Seven.

Q. And during those seven years, from your work and employment with the Rock Island, are you familiar with the method and manner of switching those mines near Pershing tracks or siding?

A. Yes, I am.

Q. And with reference to those mines, what does the Rock Island take out from those mines?

Mr. Stringer: I object to that as irrelevant and immaterial.

The Court: Overruled.

A. Coal.

Mr. Davis:

Q. They take coal, loaded cars of coal, is that correct?

A. Yes, sir.

Q. And those loaded cars of coal taken from the mines, do you know their—the loaded cars of coal when they are taken from the mine, do you know from your work where they are placed?

[fol. 46] A. Yes; they are placed at Pershing on number one and two tracks.

Q. And do you know from your work and experience where those on number one, where they go?

A. Yes, sir; they are west bound.

Q. And do you know where those on number two go?

A. East bound.

Q. Now, then, with reference to those cars, from your experience and general work there covering a number of years, including up to today and including the day of the accident, I wish you would state to the jury whether or not when these mines are switched and the loaded cars are taken out, whether cars both for points inside and outside the state are switched to tracks one and two.

Mr. Stringer: That is objected to as irrelevant and immaterial. It doesn't make any difference the day before or a week before, or what was done afterward; the question is what was done on that day; and I object to the question in that form.

The Court: Do counsel expect to connect up this evidence with other evidence showing that at the time——

Mr. Davis: That at the time they had interstate shipments.

The Court: Yes.

Mr. Davis: Yes; and that it was the general custom, both at this time and all other times, to have intrastate and interstate cars taken out of that mine and placed upon those tracks.

Mr. Stringer: What was done that day is incompetent.

The Court: I will hold it is competent, if it is connected up.

[fol. 47] Mr. Stringer: Well, what can you connect up? The rule laid down——

The Court: Overruled.

Mr. Stringer: Exception.

(Question read.)

A. Yes, they are.

Mr. Davis:

Q. And you know from your handling—how did you know or ascertain that? Did you have any manifests delivered to you?

A. Yes, sir.

Q. And do those manifests show you the number and the origin and point of destination and contents of a car?

A. Yes, sir.

Q. And you know from your experience in looking over these manifests which are delivered to you, do you, that when there is a bunch of cars from the mine to be hauled to tracks one and two, they haul them in reference as to whether they go in or out of the state.

Mr. Stringer: Objected to as incompetent, irrelevant and immaterial and leading.

Mr. Davis: Withdrawn.

The Court: Objection sustained.

Mr. Davis:

Q. Now, then, with reference to the hauling of these cars, are these mines switched practically every day?

A. Well, almost.

Q. And in switching these mines, you may state whether or not from your experience cars both for points inside and outside the state are hauled out of those mines.

Mr. Stringer: Objected to as irrelevant and immaterial, nothing to do with the——

The Court: Overruled.

[fol. 48] A. Yes, sir.

Mr. Davis:

Q. And is there any distinction made in hauling them out as to whether they go in or out of the state?

A. No; not that I ever knew of.

Mr. Stringer: Same objection.

The Court: Same ruling.

Mr. Davis:

Q. Now, Miss Hanlon, on the particular day in question, with reference to the particular day in question, that was a Sunday that Mr. Elder was injured.

A. Yes, sir.

Q. Were you at that time at Williamson?

A. I was.

Q. And did you know from your custom of doing that work how the information would be conveyed to you as to what these manifests contained?

A. I don't know just what you mean.

Q. How would the information be conveyed to you at Williamson of what these cars contained?

A. It was given me on the telephone by the conductor when they went to Chariton for dinner.

Q. That was Conductor *Hope*?

A. Yes, sir.

Q. Now, these manifests, do you know from the custom of doing the Company's business whether or not these manifests, how would you receive them when the cars of coal were picked up by the train? Well, to make it a little simpler—I don't think you will be confused, because it all appears in this record—when Mr. Hope, as the conductor, of that car, would pick up these coal cars, they would be [fol. 49] delivered to you, would they not?

A. Yes, sir.

Q. And those manifests would show the combined destination and contents and car number in issues?

A. Yes, sir.

Q. And you may state after he got those manifests whether or not there would be two copies of them.

A. Well, I don't know whether—he always would telephone the billing to me and then mail me a manifest on No. 70.

Q. Now, then, Miss Hanlon, you say that after he phoned you the numbers he would phone you at Williamson the numbers and destination, of course.

A. Yes, sir.

Q. And then later on after he would either go into Chariton or Williamson, was it part of his duty to deliver these manifests to you?

A. He would deliver them to the agent at Chariton and he would mail them to me on the train.

Q. That was part of Mr. Hope's duty to deliver these manifests either to the agent at Chariton for forwarding to you or they were sent personally to you.

A. He always did.

Q. And did you then receive these manifests in the usual course of handling the Company's business? I don't mean these particular ones, but generally.

A. Oh, yes.

Q. Now, then, these manifests would show the points of origin and the numbers on these—of the cars was on a rather light green [fol. 50] paper, are they not, sort of pinkish?

A. No; I guess they are white paper.

Q. And on this day in question did you receive a phone from Mr. Hope giving you the point of destination of a number of cars?

A. Yes, sir.

Q. Did you receive from Mr. Hope—when did you get this information?

A. Well, I received billing on one drag at 9.30 and another at 11.30.

Q. Now, when you received that information in regard to the drag at 9.30, you may state whether or not, to the jury whether or not you were informed over the phone by Mr. Hope that in that drag, which had been taken out of the mine, there were two cars of—loaded car for St. Joseph, Missouri.

A. Yes, sir.

Q. There was two cars in that first drag that Hope phoned you about consigned from Iowa to St. Joseph, Missouri.

A. Yes.

Q. And, of course, you don't know where those cars were placed except the Missouri on track one.

A. That is all I know of.

Q. Now, then, were there in that first drag any cars consigned for points in Missouri outside of St. Joseph—Trenton, Missouri? You made a memorandum, did you not, at the time, Miss Hanlon?

A. Yes, sir.

Q. Will it be of any assistance to you if you have this memorandum?

A. Yes. I don't remember about the train.

[fol. 51] Q. Now, if you can answer my question.

A. No, sir, not on the first drag.

Q. Not on the first drag. On the second drag, which was phoned you at 11.30, will you tell the jury how many cars were in that second drag for Trenton, Missouri?

A. There wasn't any.

Q. Were there any cars switching that day or handled for Trenton, Missouri?

A. Not to my knowledge.

Q. Haven't you records showing that there were some for Trenton, Missouri?

A. No, sir. This is all I copied the other day.

Q. Will you state that Mr. Hope did not inform you over the phone that there were a number of cars for Trenton, Missouri?

A. Yes, sir.

Q. When did you first hear of Trenton, Missouri, in reference to this case?

A. Well, I didn't remember.

Q. At Des Moines the other day wasn't you asked regarding Trenton, Missouri?

A. Well, I had here some lists at Des Moines. There isn't any Trenton on them.

Q. What is that?

A. There isn't any Trenton on them.

Q. Were you asked with reference to Trenton cars at Des Moines?

A. Well, I don't remember.

Q. Is that the full list of all the cars that were phoned or is there some missing? Was there some cars missing?

A. No; there is just four sheets.

Q. Well, I know, but does that contain all of the cars that he phoned you or about, or is it part of the cars?

[fol. 52] A. That is all of them.

Q. How many cars did he 'phone you about that day?

A. Well, there is nine the first time and ten the second.

Q. And you now state that Mr. Hope did not inform you that in the first drag there were not cars for Trenton, Missouri?

A. He surely did not, or I would have had it down here.

Q. Did you ever receive the manifests that he 'phoned you about?

A. I never did.

Q. Do you know what became of them?

A. Well, I couldn't say. I suppose it was burned in his caboose.

Q. When the caboose was wrecked?

A. Yes, sir.

Q. Did he 'phone you at any time with regard to five cars for Topeka, Kansas?

A. No, he did not.

Q. Did you later learn there were five cars for Topeka, Kansas?

A. No; I never knew about it.

Q. Did Mr. Armstrong, the claim agent, call to see you in regard to the manifests and shipments of these cars?

A. He called at the depot in regard to the manifests.

Q. Did he obtain them from you?

A. Yes, sir.

Q. When?

A. Well, I couldn't say; it was some time after the accident.

Q. How long after the accident?

A. I couldn't say.

[fol. 53] Q. Less than a month, wasn't it, after Mr. Hope was killed?

A. I can't remember.

Q. Well, can you tell us within a year?

A. Oh, yes; it was, I suppose, within a month or two, something like that.

Q. Now, these two cars for St. Joe, Missouri, that were taken out of the mine that morning, later went to St. Joe, Missouri, did they?

A. Yes, sir; I billed them that way.

Q. Billed them when?

A. I billed them to St. Joe that day.

Q. You billed them to St. Joe that day after receiving the 'phone from Mr. Hope?

A. Yes, sir.

Q. And they were taken out in the usual course of business for St. Joe, Missouri?

A. Yes, sir.

Q. Now, as I understand it, these loaded cars are at the mine—they are loaded at the mine?

A. Yes, sir.

Q. And then through the manifests are delivered to the conductor.

Mr. Stringer: I object to that as leading.

Mr. Davis: Oh, it is, but it is merely ordinary work.

Q. Well, are the manifests delivered to the conductor at the mine?

A. Yes, sir.

Q. And then in the course of transporting these loaded cars, where are they taken after the manifests are handed them at the mine?

A. Pershing yard.

Q. And then are there other places in furtherance of their transportation on some tracks at Pershing yard?

[fol. 54] A. Yes, sir.

Q. And those going west was placed on track one?

A. Yes, sir.

Q. So that a car, or loaded car for St. Joseph, Missouri, would be placed on track one in the usual course of the Company's business?

A. Yes.

Q. That is all.

Cross-examination.

Mr. Stringer:

Q. Miss Hanlon, you live at Williamson?

A. Yes, sir.

Q. Williamson is how far from Pershing?

A. Well, I suppose about three and a half miles.

Q. There is no station at Pershing.
A. No station.
Q. But all the work is handled from Williamson.
A. Yes, sir.
Q. And when any cars are brought up to Pershing from these mines, the usual practice is for the conductor to 'phone you, giving you what cars he has brought up.
A. Yes, sir.
Q. Is that right? Then you later receive the manifests?
A. Yes.
Q. From Chariton.
A. Yes, sir.
Q. Two drags were brought up the morning of this accident?
A. Yes, sir, two.
[fol. 55] Q. The first drag came in about 9:30?
A. Yes, sir.
Q. And the second about 11:30?
A. About 11:50, I think.
Q. 11:50. And on each of those occasions Conductor Hope 'phoned you and told you of the cars he had brought up?
A. Yes, sir.
Q. And where they were billed for?
A. Yes, sir.
Q. Or were to be billed for. And you at that time wrote down what he told you?
A. Yes, I did.
Q. Now, have you, or did you write down on both those occasions what it was that he told you, on both drags?
A. Yes, sir.
Q. Will you give me the slip which covers the first drag?

(Yellow slip of paper with figures on it marked defendant's Exhibit "A.")

Q. I show you defendant's Exhibit "A," that is, as I understand it, the record which you made at the time of your telephone conversation with Mr. Hope, when he came up with the first drag?
A. Yes, sir.

Mr. Stringer: I offer it in evidence.

Mr. Davis:

Q. You claim it is the St. Joe car?
A. Yes, sir.

Mr. Davis: No objection.

Mr. Stringer:

Q. Did you keep a memorandum of the conversation of the cars that came in on the second drag?
A. I did.
[fol. 56] Q. Have you that with you?

(Three yellow slips with figures on them marked defendant's exhibit "B.")

Q. I show you defendant's exhibit "B," that is, as I understand it, the memorandum which you made of the cars that came in under the second drag?

A. Yes, sir.

Q. And does that truly show the numbers of the cars and where they were destined for?

A. It does.

Q. And did you, pursuant to that, bill the cars to those destinations?

A. I did.

Mr. Stringer: Offered in evidence,

Mr. Davis: No objection.

Mr. Stringer:

Q. Now, taking these exhibits, Miss Hanlon, will you read into the record the numbers of the cars and the places to where they were billed on the first drag?

A. The car numbers and their destinations?

Q. The car numbers and the destinations of the cars that came in on the first drag.

A. Rock Island 87413, Valley Junction, Iowa; Rock Island 86038, Valley Junction, Iowa; Rock Island 89252, Allerton, Iowa; M. W. S. 191, Allerton; Rock Island 82499, Allerton; L. A. M. 77906, Allerton; Rock Island 88243, Valley Junction.

Q. Would you speak a little louder? I am afraid the jury is not hearing.

A. L. A. M. 62565, St. Joe, Missouri; K. C. S. 27783, St. Joe, Missouri.

Q. Now, that is the list of the cars that came in the first drag at 9:30?

[fol. 57] A. Yes, sir.

Q. Would you take the list that you made with respect to the cars that came in at 11:50 on the second drag and read into the record the numbers of those cars?

A. Rock Island 99271, Allerton, Iowa; Rock Island 1000221, Valley Junction; Rock Island 98251, Valley Junction; V. G. N. 15533, Valley Junction.

Q. Valley Junction is where?

A. Iowa. Rock Island 87021, Valley Junction, Iowa; Rock Island 82785, Valley Junction, Iowa; Rock Island 82324, Valley Junction, Iowa; Rock Island 84220, Valley Junction, Iowa; Rock Island 84322, Valley Junction, Iowa; Rock Island 99750, Valley Junction, Iowa.

Q. There were then, as I understand it, no cars in the second drag destined outside of the State of Iowa?

A. No, sir.

Q. That is all.

Mr. Davis: That is all. Oh, no, just a moment, Miss Hanlon.

Redirect examination.

Mr. Davis:

Q. When Mr. Hope went into Chariton, did he call you up over the 'phone?
A. He gave me that billing.
Q. Well, when he went into Chariton he had a talk with you about going into Chariton for water, did he?
A. At the time he gave me that billing I asked where he was going for dinner and he said to Chariton.
[fol. 58] Q. Did he not tell you he was going for water?
A. No; he said he was going in to dinner.
Q. Did he not tell you that he was going for water to Chariton?

Mr. Stringer: Objected to as hearsay.
The Court: Objection sustained.

Mr. Davis:

Q. In talking to Mr. Hope, you may state—not state what was said but you learned from him what he was going to do after he went to Chariton and got his dinner. Just answer that yes or no.

Mr. Stringer: Objected to as hearsay.
The Court: She may answer that yes or no.

A. Well, I couldn't hardly answer it yes or no.

Mr. Stringer: I don't believe the question could be answered that way.
Mr. Davis: That is all.

The Court:

Q. I didn't clearly understand from what point you received the telephone conversation when you took that memorandum here in defendant's Exhibit "A" and "B." From what point?
A. Pershing, Iowa.

Mr. Stringer:

Q. That is, Mr. Hope was talking at Pershing?
A. Yes, sir. I was at Williamson and he was at Pershing.

Mr. Davis:

Q. In this talk which you had with regard to these cars in Exhibit "B," was that the same talk and a part of the same conversation that you had with reference to what Mr. Hope was going to do?
[fol. 59] A. At 11:50; yes, sir.

Q. And Mr. Stringer has inquired with reference to a part of that conversation, with regard to the destination of these cars, has he not?

A. I don't understand.

Q. Mr. Stringer has asked you with regards to a part of the conversation you had with Hope at that time?

A. I don't think Mr. Stringer ever did.

Q. With reference to now, I mean, today here in court.

A. Oh, yes.

Q. And you have been testifying in response to questions from him with reference to part of the conversations you had with Hope at 11:30, with regard to these cars?

A. Yes, sir.

Q. Was all the talk you had with Hope with reference to the carrying on of the Company's business, that is, with reference to work being done?

A. Part of it.

Q. And was it customary for the conductor to inform you as to what work he would proceed to do if he went to a certain station and then came back?

A. No, sir.

Mr. Stringer: That is objected to as——

Mr. Davis: That is all, I think.

Q. Oh, just one other question, Miss Hanlon, if you will pardon me. Do you know the station known as O. D. 27 on the Rock Island line?

A. That is Pershing, Iowa.

Q. How?

A. Pershing.

[fol. 60] Q. That is the Pershing yards. That is the station at which orders are received by trainmen in the handling of the trains, is it not, by telephone or otherwise?

A. By telephone.

Q. And it is listed on the Rock Island lines as O. D. 27?

A. Yes, sir.

Q. What did you mean, when Mr. Stringer, in saying that it wasn't a station?

A. Why, they don't call it a station; no trains stop there; it is just a yard.

Q. Is O. D. 27 a number of and an initial of a station? You just said it was.

A. Well, I suppose it is for the conductors' benefit where they pick up.

Q. Well, it is for the benefit of the conductor and the Company's business?

A. I suppose it is.

Q. In other words, there is no depot there?

A. No, sir.

Q. There is a telephone station there?

A. There is a telephone station there.

Q. And that is listed on the books as O. D. 27, and at that station or place orders are transmitted to the men at that point as to what they shall do and as to how they shall move on the tracks?

Mr. Stringer: I object to the question as extremely leading.

The court: Objection sustained.

Mr. Davis:

Q. Are orders transmitted to those men?
A. Yes, they are.
Q. In what way?
[fol. 61] A. On the telephone.
Q. By whom?
A. Dispatcher.
Q. The train dispatcher?
A. Yes, sir.
Q. Do those orders have reference to the movement of trains both there and on the main line?
A. On the main line.
Q. And also with reference to the movement of those trains at Pershing, do they not, as to what they shall do with them?
A. Well, they always know what to do at Pershing, but when they come out on the main line they have to get orders from the dispatcher.
Q. That is, at that point, O. D. 27, is the point at which they receive or transmit information to the dispatcher?
A. Yes, sir.
Q. I think that is all.

Fred A. Elder, called and sworn as a witness in his own behalf, testified as follows:

Mr. Davis:

Q. You may state your full name.
A. Fred A. Elder.
Q. How old a man are you, Mr. Elder?
A. Thirty-eight years old.
Q. Married?
A. Yes, sir.
Q. Have a family?
A. Yes, sir.
[fol. 62] Q. How many children?
A. Four children.
Q. And your home is at Chariton, Iowa?
A. Yes, sir.
Q. You were formerly employed, I believe, as a brakeman by the Rock Island Railway?
A. Yes, sir.
Q. Working as a brakeman in its work around Chariton, Iowa?
A. Yes, sir.
Q. How many years you been employed as a brakeman?
A. Almost nine.
Q. During how many years previous to this accident had you worked in the work of switching these mines near Pershing siding?

A. Almost four years.
Q. Or Pershing yards?
A. Yes, sir.
Q. And who was during that time your conductor most of the time?
A. Conductor Hope.
Q. C. Y. Hope?
A. Yes, sir.
A. And during those four years did you work practically steady at those mines?
A. Yes, sir.
Q. Now, then, in working at those mines, about how many times a week would you switch those mines?
A. Well, we switched the mines ever time that the mine has work there, and if they had too many rains, why we would have to work the idle days in order to catch up.
[fol. 63] Q. And some days is what would be known as idle days then, and in switching those mines your conductor—do you know from your experience from whom your conductor would get the manifests?
A. Yes, sir.
Q. From whom?
A. He would get it from the way boss at the mine.
Q. Now, when you went down to switch a mine, as you call it, do you know what the custom was as to taking all the loads each time?
A. Yes, sir.
Q. What was that custom? To take them out and designate them where they went—take out all the loads that were at the mines?
A. Yes, sir.
Q. And regardless of whether they went in or out of the state?
A. Yes, sir.
Q. And when you took those loads out, where would you put loads, both intrastate and interstate, going west?
A. The St. Joe cars and such as that on number one track.
Q. And where were—would you put intrastate and interstate cars going east on number——
A. On number two track.
Q. Now, then, during the time that you were working, you may state to the jury whether or not in handling these cars at the mine any distinction was made between cars going out of or into the state?
A. No, sir.

[fol. 64] Mr. Stringer: Objected to as irrelevant and immaterial.
The Court: Overruled.

Mr. Davis:

Q. And you may state whether or not that day you handled cars both for—for points both into and out of the state of Iowa?
A. Yes, sir.
Mr. Stringer: Objected to as no foundation laid, calling for a conclusion.

Mr. Davis: Why, you conceded that there were cars for St. Joe and for Valley Junction, Mr. Stringer.

Mr. Stringer: Well, I conceded that he handled those cars, if that is what you are getting at.

Mr. Davis: I will withdraw it and frame it this way.

Q. You may state to the jury whether or not you handled cars both for St. Joe, Missouri, and for Valley Junction and Allerton, Iowa?

A. Yes, sir.

Q. And in handling those cars, you may state to the jury whether or not any distinction was made as to whether you were hauling cars for St. Joe at one time and for points in Iowa at another time?

A. No, sir.

Q. Or whether the work was co-mingled?

A. No, sir.

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

[fol. 65] Q. Now, then in hauling the cars, when you went down to the mines, I wish you would tell the jury what the first work was with reference to any cars.

A. The first work we got a train out from number two.

Q. And what did that train consist of?

A. It consisted of cars going to St. Joe, Allerton and Valley Junction.

Mr. Stringer: I object to stating where they were going to. If you intend to deviate from that——

Mr. Davis: I assure you we intend to deviate.

Mr. Stringer: Well, I object to the statement of this witness as to where any cars were going to, on the ground there was no foundation laid.

The Court: That is on the first load?

Mr. Davis: Yes. Now, then——

Mr. Stringer: The first load, yes.

Mr. Davis:

Q. Now, then, did you switch any on the mine that those come from?

A. Number two mine.

Q. Did you do any switching at number three mine?

A. Yes, sir.

Q. What switching did you do at number three mine that morning?

A. We got a train of coal there.

Q. How many cars?

A. There was nine cars.

Q. What did you do with them?

A. Brought them to the main line and put on two track and one track.

Q. Did you switch any at number one that day—number one mine?

A. No; number one mine isn't working.

[fol. 66] Q. Did you switch any cars from Topeka, Kansas, that day?

Mr. Stringer: Objected to as calling for the conclusion of the witness and no foundation laid.

Mr. Davis: Withdrawn.

Q. I wish you would state to the jury whether or not you switched five cars there that were not taken to tracks one and two.

A. Yes, sir; we pulled five cars down on number one load track and number two mine, the conductor said, was Topeka, Kansas.

Mr. Stringer: I object to that as hearsay and move to strike the latter—portion of the answer out.

The Court: Motion granted.

Mr. Davis:

Q. Did you haul any of those five cars out or take them from number two or leave them pulled out of the mine part way?

A. We left them to clear out number one load track at number two mine.

Q. Do you know where those cars were going?

A. Yes, sir.

Q. Where?

Mr. Stringer: That is objected to as no foundation laid and calling for the conclusion of the witness.

The Court: I think the witness should qualify himself.

Mr. Davis:

Q. Well, did you see the manifests for those cars?

A. I saw that that was the manifest of—the conductor had it and he told me they were going——

Mr. Stringer: I move to strike out the answer.

The Court: Strike out what the conductor told you.

[fol. 67] Mr. Davis:

Q. How, in the usual course of the conductor's business did he show you where cars were going?

A. From the manifests.

Q. And did you see the manifests that day?

A. Certainly; I had to see it to do the work there.

Q. Was it part of your duty not to switch any of these cars—would you have a manifest given to you or a copy?

A. Yes, sir.

Q. On the manifests coming to you you would make lists of the cars and where going?

A. Yes, sir.

Q. When would you make those lists, as you took them from the tracks one and two?

A. As we was coming out the mines to the main line.

Q. And were these manifests handed to you by Mr. Hope?

A. Yes, sir; I looked them all over.

Q. Do you know what became of these manifests for the five cars?

A. They were in the train book. The evidently burned up when the car burned up.

Q. That were in that caboose?

A. Yes, sir.

Q. Do you know who put them in the train book?

A. Yes, sir; I put them in myself when I am—my switch list.

Q. Now, then, in handling those five cars, did you handle them in accordance with instructions from the manifests?

[fol. 68] A. Yes, sir. We pulled them down and tied them down and intended to bring thirteen cars out.

Q. Where did you tie them down?

A. Well, at the clear on number one load track.

Q. Tell the jury whether you would have any work to do with reference to those five cars?

Mr. Stringer: That is objected to as calling for the conclusion of the witness. He wasn't in charge of the car and the conductor was the man in charge, and it appears that the conductor worked from instructions from the dispatcher. Now, I object to that as a mere conclusion.

The Court: Objection sustained.

Mr. Davis: Exception. I am asking him——

The Court: Did that finish the question?

Mr. Davis: That is all.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

Mr. Stringer: I want to get in there, if I may.

A. We had brought it out to the main line.

Mr. Stringer: That is objected to as irrelevant and immaterial and calling for the conclusion of the witness and no foundation laid. Might I ask a preliminary question?

Mr. Davis: Yes.

Mr. Stringer:

Q. The conductor was the one in charge of this crew was he not?

A. He was in charge of the crew, yes, sir.

Q. And you would take your orders from him?

A. Yes, sir.

Q. And he would act on orders from the dispatcher?

A. Yes, sir, as far as running and handling the train over the road, yes.

Mr. Stringer: That is objected to as no foundation laid, calling [fol. 69] for the conclusion of the witness and irrelevant and immaterial.

The Court: Same ruling.

Mr. Davis:

Q. You may answer. Did you have any work to do with those cars?

A. Yes, sir; we had to finish cleaning out the mines, and put in empties yet.

Q. Do you know from your custom of doing the work, had you completed the work that day?

A. No, sir.

Q. You may state whether or not you had hauled all loads out of the mine that day before the accident.

A. No, sir. Left loads at number two and left loads at number three mine and had instructions——

Mr. Stringer: I move to strike out the instructions.

The Court: Motion granted.

Mr. Davis:

Q. You may state whether or not you placed all empties in that mine you had?

A. We hadn't put any empties in at all at number three mine.

Q. When you placed those empties there, they were placed in the mine for the purpose of loading?

A. Yes, sir.

Q. And afterwards they were hauled out for the purpose of unloading?

A. Yes, sir.

Q. Now, then, after you had switched these five cars from number two mine and tied them down on track one at the mine, did you get a drag of cars out of the mine?

A. At that time, yes, sir.

[fol. 70] Q. And how many?

A. I think there were eleven.

Q. And just tell the jury where you placed those cars.

A. We placed the St. Joe cars and the Allerton cars on number one track and the Valley Junction cars on number two track.

Q. And after placing them on track one and two, did you go back and get another drag?

A. We went back to number three mine.

Q. And did you get a drag there?

A. Yes, sir, we did.

Q. How many cars?

A. Nine.

Q. And tell the jury what you did with those?

A. We put the Valley Junction cars on number two track and shoved the Allerton cars down against the St. Joe cars.

Q. You went down and got a second drag of cars?
A. Yes, sir.
Q. And there were cars there for Allerton and Valley Junction?
A. Yes, sir.
Q. Now, Allerton is east or west?
A. West.
Q. Then would those cars be placed on the same track as the St. Joe?
A. Yes, sir.
Q. And the Valley Junction would be placed on the east track?
A. Yes, sir.
Q. Now, after placing the cars, I wish you would tell the jury how you placed them when you left that last drag, what cars, if you [fol. 71] can remember, you first placed on two and then on one and so on.
A. We put away these cars on number two track, shoved them in and tied them down——
Q. How many cars did you have to place on number one track in that last drag?
A. We had one.
Q. And when you shoved in on number one track, then tell the jury what you did with reference to the movement of any of the cars on the track?
A. We tied into the St. Joe cars and Allerton cars.
Q. Tied—what do you mean?
A. Make a coupling.
Q. Who coupled the Allerton car to the St. Joe car?
A. I did myself.
Q. And there was two St. Joe cars?
A. Yes, sir.
Q. And then after coupling them, what was done?
A. We shoved them down to clear number two track to Pershing yards.
Q. You shoved the Allerton cars and the St. Joe down to number two track towards the west?
A. Yes, sir.
Q. And after shoving them down, how far do you say they were shoved?
A. Six or eight car lengths.
Q. What was then done with reference to the cars?
A. We set the brakes on them.
Q. And who set the brakes?
[fol. 72] A. I and Mr. Decker.
Q. Tell the jury how that was done.
A. Mr. Decker would tie the rear end of the train down when he would stop and I would bust the air on the front car.
Q. Explain to the jury what you mean by busting the air?
A. Just break the air hose that would throw the brakes in emergency, and he started at the rear end and I would start at the end of the engine.

Q. In setting the brakes, as I understand it, you climbed up the side of the car near the end on what is known as hand holds?

A. Yes, sir.

Q. And then the brake is situated about the center of the car?

A. On the end of the car.

Q. The center of the end,—is that right?

A. Yes.

Q. Now, then, you got up at the front end of the car next to the engine?

A. Yes, sir.

Q. And what car did you set the brakes on after they had been stopped about six car lengths to the west?

A. I set the brakes on the loaded cars.

Q. Now, what were those?

A. On was Allerton, two St. Joe, and the other four Allerton behind them.

Q. You set the brakes on three cars?

A. I set the brakes on three cars ahead of the cars that I know.

Q. That was the Allerton cars and the two St. Joe cars?

[fol. 73] A. Yes, sir.

Q. And then do you know from your custom of doing work there whether or not these cars would be left there or whether they would have to be shoved to the west end of one?

A. We would have to shove them to the west end when we would come back after dinner.

Mr. Stringer: I move to strike out the answer as irrelevant and immaterial, on the ground that that statement about coming back after dinner——

The Court: I think the answer states a conclusion. He may state what the work was.

Mr. Davis:

Q. Will you state what work you had to do with reference to these cars that was there after you pushed six car lengths down the track?

Mr. Stringer: That is objected to as calling for a conclusion.
The Court: Overruled.

Mr. Davis:

Q. Now, what was the purpose of shoving them to the west end of the—to the west?

Mr. Stringer: Same objection.
The Court: Same ruling.

A. We shoved them to the west end of number one track.

Mr. Davis:

Q. And do you know from your experience in the manner and custom of doing the work whether or not before finishing the work you would have to have those cars at the west end of one?

A. Yes, sir; that was always the instructions.
Q. After you had set the brakes on these St. Joseph cars, you may state whether or not you uncoupled the engine from those cars from the end of the string?
[fol 74] A. Yes, sir.
Q. And then what did you do?
A. We got our caboose.
Q. And where did you go?
A. We started for Chariton.
Q. And what was the occasion of your going to Chariton?
A. For water and dinner.
Q. And water for what?
A. Water for the engine.
Q. Now, then, how did you ascertain you had to have water for the engine?

Mr. Stringer: That is objected to as irrelevant and immaterial, calling for the conclusion of the witness, doesn't appear that this witness had anything to do with the operation of the engine.
The Court: Objection sustained.

Mr. Davis:

Q. You may state whether or not you were acquainted with the engineer?
A. Yes, sir.
Q. You may state whether or not he said anything relative to water for that engine?

Mr. Stringer: Objected to as hearsay.
The Court: What the engineer said is hearsay.
Mr. Davis: An engineer in charge of the engine of the Company, does the court hold that is hearsay?
The Court: Objection sustained.
Mr. Davis: Well, we ask this question then.

Q. You may state what the engineer said with reference to getting water for that engine?

Mr. Stringer: Objected to as hearsay.
The Court: Objection sustained.
[fol. 75] Mr. Davis: We offer to show by this witness——
Mr. Stringer: I think counsel ought to make his offer in private. I don't know what it is going to be, but——

Mr. Davis:

Q. Now, Mr. Elder, after you cut off onto the caboose where were you going, you say?
A. Chariton.
Q. Chariton, Iowa. And on the way in did you have to go on the main line track?
A. Yes, sir.

Q. And while you were going in did a collision occur?
A. Yes, sir.
Q. I wish you would tell the jury what happened to you, as near as you can, at that time?
A. Well, as near as I can tell, I was all mashed up.

Mr. Stringer: Well, I move to exclude that as a mere conclusion.
Mr. Davis: I don't think it is.
The Court: You may strike the answer. Tell just what took place.

Mr. Davis:

Q. Just tell what happened to you.
A. Well, on the way in we were struck by a passenger train running between Minneapolis and Kansas City, known as 69, through that part.
Q. And what became of you, if you can remember?
A. Well, when I came to, I was in the hospital.
Q. How long afterwards before you came to?
A. Well, it was Wednesday afterwards, or along in there.
[fol. 76] Q. And you were hurt on a Sunday, were you?
A. Yes, sir.
Q. Now, then, when you came to, you may tell the jury whether or not you had any burns on your back?
A. Well, the first I can remember, they had me in some position and I asked them what they were doing and they said they were picking cinders out of my back.
Q. And who nursed you?
A. Miss Ida Price.
Q. And what hospital were you taken to?
A. Yokum & Yokum at Chariton. They are physicians of Chariton. I think they are known as the Rock Island physicians there.
Q. Rock Island doctors there?
A. Yes, sir.
Q. Mr. Elder, during the time you were working generally, say the year previous, I wish you would state what your average monthly earning were?
A. Average amount, $240.00 to $-50.00 a month.
Q. And were you in good health before you were hurt?
A. Yes, sir.
Q. Did you work regularly?
A. Every day.
Q. Now, then, how long did you remain in the hospital?
A. I was there just five weeks, I think.
Q. Five weeks?
A. At that one particular place.
Q. And during that time you may tell the jury whether you suffered any pain?
[fol. 77] A. Yes, I suffered all the time; suffer yet.
Q. Now, this pain, describe it, if you can, to the jury.
A. Well, it is in my spine and through my chest and in my head.

Q. It is in your spine and through your chest and where?
A. And in my head.
Q. While you were in the hospital, you may state to the jury whether or not you suffered from headaches?
A. Yes, I suffered from headaches.
Q. And you may state to the jury whether or not you are bothered now with headaches?
A. Yes, sir, I am.
Q. Describe the location, as near as you can, of those headaches.
A. Well, the pain is really sharp pains up through the back of my head and over the top, then in through here (indicating).
Q. You are pointing at the lower part of the forehead, between the eyes, just above the breech of the nose?
A. Yes, sir.
Q. Now, then, with reference to your ribs, did you sustain some broken ribs?
A. Yes, sir.
Q. And does that cause you pain now?
A. Yes, sir, they do.
Q. Describe that to the jury.
A. I have sharp shooting pains around me from those injuries. When I take a deep breath I have something that hurts me in here, something that feels like it slaps me. I don't know what it is.
[fol. 78] Q. Mr. Elder, did you suffer any injury to you back, in addition to your ribs?
A. Yes, sir.
Q. Now, then, from the time of the injury to the present time, you may state whether or not you suffered pain where your ribs were fractured?
A. Yes, suffered pain where my ribs was fractured.
Q. And what did you weigh at the time you were hurt?
A. I weighed 183 the last time I was weighed.
Q. Were you weighed recently?
A. I was weighed just a few days before this accident.
Q. Well, I say now, since, before this trial, have you been weighed?
A. Yes, I was weighed just the other day.
Q. What did you weigh then?
A. 157.
Q. And with reference to your back and the pain in your back, you may tell the jury whether that pain has been continuous from the time of the injury to the present time?
A. Yes, sir, it has.
Q. And how has it affected you with regard to your sleep?
A. Well, I don't sleep, that is, to lay down and to sleep; I probably lay in bed until three or four o'clock in the morning before I go to sleep, and then I will sleep about three or four hours.
Q. Were you ever affected that way before this injury?
A. No, sir.
Q. And does that injury to your back and this pain cause you to wake up at night?
[fol. 79] A. Yes, sir; I wake up with jerks in my back.

Q. Is that painful?
A. Yes sir.
Q. Before you were hurt, were you ever troubled that way?
A. No, sir.
Q. How old a man are you?
A. Thirty-eight years old.
Q. And when were you thirty-eight?
A. I was thirty-eight the 14th day of last March.
Q. And you will be thirty-nine this coming March?
A. The 14th day of this month; yes, sir.
Q. Mr. Elder, since your injury, have you tried to walk?
A. Yes, I try to walk, but I don't have much luck.
Q. Well, in what way does it affect you in walking?
A. Well, my legs become numb and I am out of breath and my back hurts me when I walk with my back moving.
Q. I notice you stoop one shoulder down. Can you walk as you usually did, with your shoulders straight up?
A. I don't seem to have any strength along my left side.
Q. How far can you walk without having to stoop?
A. Well, six or seven blocks is about as far as I can go.
Q. Before the injury were you strong and able-bodied?
A. Yes, sir.
[fol. 80] Q. And did the general work of a switchman every day?
A. Yes, sir.
Q. And did that work consist of climbing up and down box cars and walking about and throwing switches and uncoupling cars?
A. Yes, sir; caused me to climb two or three hundred cars a day up and down.
Q. And was that work what you would call hard manual labor?
A. Yes, sir; known as the hardest job on that division.
Q. Now, then, with reference to your back, while you were in the hospital, you may state whether the doctors did anything for your back?
A. Yes, they did all they could. They couldn't do much, on account of my burn.
Q. Later on, tell the jury whether or not you were given any brace or cusion or corset for your back?
A. Yes, sir.
Q. Who gave that to you?
A. Well, I got it from one of the doctors' brother-in-laws.
Q. What doctor's brother-in-law?
A. Doctor Yokum.
Q. Doctor Yokum. And when did you get that?
A. Well, I don't know just the time. It was shortly after I could get so I could walk around with assistance.
Q. And have you had to wear that practically ever since?
A. Yes, sir.
Q. Can you move about without it?
[fol. 81] A. Not any——
Q. Does this to some extent assist you in moving about?
A. Yes; it holds me up.

Q. Will you describe that, if you can, so the jury will——

A. Well, it is a big—you might say it is a big corset.

Q. Well, can you unbotton your vest and show it, if you will just?

(Witness unbuttons his clothing.)

Q. Now, this corset is a brace that goes clear around your body?

A. Yes, sir.

Q. And I notice it is buckled at the front with four or five elastic straps, sort of a suspender strap,—is that correct?

A. Yes, sir.

Q. And about how far down—it is about up to or at least above the nipples of your breast.

A. Yes, sir, and it runs up under my arms.

Q. And it runs up under your arms, about the arm pits, does it?

A. Yes, sir.

Q. And running down, it runs down how far towards your hips?

A. Right to my hips.

Q. And then at the back does it run off to a point about two and a half to three inches below the neck, the bottom of the neck?

A. Two strap irons.

Q. And are those strap irons over your shoulder?

A. No, sir; they are fastened around the arm and over my shoulder and around my body down here (indicating).

[fol. 82] Q. Now, then, this brace—can you stand up a moment? (Witness stands up.) Just turn your back. You can take off your coat, can you?

(Witness takes off his coat.)

Q. Now, this brace consists of two iron straps which run within about two and a half inches of the top of your spine, is it?

A. Yes, sir.

Q. And runs downward, clear down to below the bottom of the spine,—is that correct?

A. Yes, sir.

Q. And have you had to wear that ever since it has been given to you, Mr. Elder?

A. Yes, sir.

Q. And has there been a day since you have been injured that you haven't suffered pain as the result of this injury to your back?

A. No, sir; there have not.

Q. Mr. Elder, in regard to your being unconscious, have you ever suffered from dizzy spells since that time?

A. Yes, sir; I do yet.

Q. And with reference to the dizzy spells, I wish you would describe that to the jury.

A. Well, I get a jerk or jam, I would be walking and my foot slips, jams together and then I go dizzy.

Q. And were you ever troubled that way before?

A. No, sir.

Q. Now, Mr. Elder, with reference to pain, have you suffered any pain in your pelvic region down here?

A. At the back, I do.

[fol. 83] Q. Whereabouts in the back? Just describe that to the jury.

A. Well, just about along where you have your hands.

Q. Well, that would be at the lower part of your back, where the hips—between the hips and the lower part of the spine?

A. Yes, sir.

Q. And describe that pain to the jury.

A. Well, that is just a gradual pain all the time.

Q. Were you X-rayed by the doctors?

A. Yes, sir.

Q. Did they tell you you had a fracture of the pelvis?

A. Yes, sir.

Mr. Stringer: Objected to as hearsay.

Mr. Davis: Withdrawn. Will you have your doctor here?

Mr. Stringer: What doctor is it?

Mr. Davis: The doctor that took those X-rays of his pelvis.

Mr. Stringer: Well, I don't know who he is, but I don't expect to have him here.

Mr. Davis:

Q. Was he the company doctor?

A. Yes, sir.

Q. What was his name?

A. Doctor Yokum.

Q. Still in their employ?

A. Well, I couldn't say as to that.

Q. Now, Mr. Elder, since this accident, have you to the present time tried to get along and better yourself?

A. Yes; I have tried everything

Q. And have you done any massaging for your back?

[fol. 84] A. I took electric treatments.

Q. Well, how long did you take electric treatments?

A. Well, I took them along in the summer. Didn't seem to do me any special benefit.

Q. And with regard to walking, Mr. Elder, have you any difficulty in walking since you were hurt?

A. Yes, I do.

Q. Well, tell the jury in what way you are affected in walking.

A. Well, my feet become numb when I walk any distance, and then my hips, I couldn't——

Q. Well, in what way does it affect your feet?

A. Well, I have to force my feet to go.

Q. Tell the jury in what way and why. We have to have this in the record, Mr. Elder. It comes—well, I don't know exactly how to explain it. It is labor to make my feet travel.

Q. Before you were hurt, in walking along were you ever affected that way, or afflicted?

A. No; I wasn't affected in any way.

Q. In walking, were you affected with any numbness, with numbness of your feet or having to draw your feet?
A. No.
Q. Which side of your leg or foot is it that this difficulty is?
A. Well, my left one is the worst. They both bother me.
Q. That is all?

Mr. Stringer: No cross-examination.
The Court: We will take a recess until half past one.

Mr. Davis:

Q. Just take the stand a moment, Mr. Elder, you may state to [fol. 85] the jury what the last work you did with regard to any of those coal cars. Was it before you started for Chariton?
A. We shoved them down about seven car lengths on number one track, the St. Joe car and the Allerton.
Q. Did you set the brakes on the St. Joe car?
A. Yes, sir.
Q. Was that the last thing you did with reference to the movements of the St. Joe car?
A. Yes, sir
Q. And then you moved on to Chariton?
A. Yes, sir.
Q. And on your way into Chariton you were injured?
A. Yes, sir.
Q. That is all.

Mr. Stringer: That is all.

Ida Price, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. You may state you full name?
A. Ida Price.
Q. And, Miss Price, are you a nurse?
A. Yes.
Q. And were you formerly a nurse of Mr. Elder's at Chariton, Iowa?
A. Yes.
Q. Were you called to attend him on Sunday, in February the 4th, 1923?
A. Yes.
Q. When you arrived at the hospital, I wish you would tell this [fol. 86] jury the condition of Mr. Elder. Just tell them in what condition you found him.
A. I found him in an unconscious condition.
Q. What time of night was that?
A. Seven o'clock.

Q. Now, just describe his body, as to any burns or marks or anything of that kind.

A. He had a first degree burn from here up to here.

Q. Now, what do you mean, from his hips up toward the pit of the arm?

A. Yes. Half way between the knee and the hip joint the burn extended up. That was on the back.

Q. Was there any marks on his head, or bruises?

A. Yes.

Q. Just describe those to the jury.

A. Severe bruise on the left side of the head.

Q. Any had any blood come from that?

A. Yes.

Q. The blood showed from the hair or the marks, did it?

A. Yes.

Q. Was there any broken ribs that you know of, or did you ascertain that?

Mr. Stringer: That I think is objected to as incompetent.

Mr. Davis:

Q. Did you notice any marks along the ribs?

The Court: She may answer.

A. I did not, because that wasn't——

Mr. Davis:

Q. Were you present when anything was done for his ribs?

[fol. 87] A. Yes.

Q. What was done? Just tell the jury.

A. Well, on Wednesday after the accident, Doctor Yokum put adhesive straps, on the left side, Doctor Yokum, Sr., and an hour afterwards Doctor Yokum, Jr., come in and took them off because it made it so difficult for him to breathe.

Q. Now, with reference to his back—how long did you attend him in the hospital?

A. Five weeks at the hospital.

Q. Five weeks at the hospital, and after he was out of the hospital did you attend him at his home?

A. Yes.

Q. How long?

A. Just one day of being the two weeks at home.

Q. And were you employed by the Rock Island Railroad to attend him?

A. Yes.

Q. Now, Miss Price, with reference to his condition in the hospital and pain in his back that he has testified to, in the small of the back, you may tell the jury whether or not he complained of pain at all times while you were attending him in the hospital.

A. Yes.

Mr. Stringer Objected to as incompetent.
Mr. Davis: Withdrawn.

Q. You may testify whether he showed any signs of pain in his back.

Mr. Stringer: Same objection, your Honor, and calling for a conclusion.
The Court: Any visible signs?
Mr. Davis: Withdraw that.

[fol. 88] Q. What did he do in the hospital? How did he rest? Just tell the jury that.
A. He didn't rest.
Q. What did he do? Just describe that to the jury. They want to know just how he acted in the hospital; how it affected him, these injuries.
A. Well, he had no rest except under the opiate, morphine. We gave him a hypodermic.
Q. State whether or not he groaned?
A. Yes.
Q. And with regard to his back, and the burns on his back, state whether or not any ulcer came out on his back?
A. Five.
Q. And how long did those ulcers continue on his back?
A. The one was still open when I left him—seven weeks.
Q. One ulcer was still open?
A. Yes.
Q. And those ulcers run?
A. Yes.
Q. Do you know whether they were painful?
—. ——.

Mr. Stringer: Objected to as calling for the conclusion of the witness.
The Court: She may answer.

Mr. Davis:

Q. Do you know whether they were painful?
A. Yes; he complained of them very much.

Mr. Stringer: I move to strike out the answer.
The Court: Strike out the last part of the answer.

Mr. Davis:

Q. Now, Miss Price, from the time you saw him at seven o'clock [fol. 89] Sunday night, you say he was unconscious, when was the first time that you noticed he began consciousness?
A. It was a slight gaining of that on Wednesday for the first.
Q. On Wednesday. I think that is all.

Cross-examination.

Mr. Stringer:

Q. He continued to improve under your treatment? The burn got well?
A. Well, yes.
Q. The ulcers cleared up, all but the one, when you left?
A. Well, the two, on the head and one on the back; there were two that were not healed when I left.
Q. The one on the head was not healed?
A. Was not healed.
Q. There was an ulcer there. That is all.

Redirect examination

Mr. Davis:

Q. While you were there, did Doctor Yokum prescribe this jacket, while you were attending him, or later?
A. No; that is, we didn't put it on him then.
Q. Did he have it—do you know when he got it?
A. No.
Q. That is all, Miss Price.

Mr. Davis: In view of the fact that negligence was admitted, Mr. Stringer, I would like to inquire now whether you make any claim of [fol. 90] contributory negligence or assumption of risk in this case?
Mr. Stringer: None.
Mr. Davis: The record may so show, that there is neither a claim of assumption of risk or contributory negligence.
Mr. Davis: Mr. Stringer, we now offer to read into the record from the American Experience Table of Mortalities the expectancy of life of a man thirty-eight years of age, showing that his normal expectancy is twenty-nine and sixty-two one hundredths years, and offer the same as evidence in this case. Any objection?
Mr. Stringer: What is that expectancy?
Mr. Davis: Twenty-nine and sixty-two one hundredths years.

John A. McIntyre, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. State your full name?
A. John A. McIntyre.
Q. Doctor, you live here in Owatonna?
A. Yes, sir.
Q. And are a licensed and practicing physician and surgeon?
A. Yes, sir.

Q. And have been practicing your profession for how many years?
A. Since 1916.
Q. And located here during all that time?
[fol. 91] A. No, sir; I was in Davenport one year and two and a half years in the army; since that time in Minnesota, two and a half years here.
Q. And during the two and a half years in the army where were you?
A. Thirteen months of it in France and the rest at Camp Dodge.
Q. And you saw overseas service in France, Doctor?
A. Yes, sir.
Q. Now, Doctor, during your experience as a physician and surgeon and during your experience in the army, have you had occasion to examine men with injured vertebrae—injured spine?
A. Quite a few cases.
Q. And I will ask you if, at our request, last Saturday, in conjunction with Dr. Sheldrop, you examined Mr. Elder, the plaintiff?
A. I did.
Q. I wish you would detail briefly to the jury what you did in examining him, Doctor.
A. When we started the examination on this man, we went over him, what we call a physical examination, we started in at his head and his body and his extremities and examined on his head. He had a small scar over the right eye and another small scar over the occipital region, and that was all the external evidence of injury on the head. The eyes apparently all normal and nose and throat, and the chest——

Mr. Stringer:

Q. Anything said about the throat, Doctor?
A. Nose and throat were negative. The chest examination didn't [fol. 92] reveal anything wrong with the heart or the lungs, as far as we were able to make out at that examination, although externally, showed external evidence of old fracture of the ribs on the left side in the axillary line; practically all the ribs, so far as you could feel up and down the axillary line, there was evidence of old fractures or deformity that you could feel on external manipulation. The abdomen apparently was negative. But in the back, in the back region, there was a scar over about the first lumbar vertebra and in that region a considerable pain and tenderness. Now, this pain and tenderness extended down and up—up until about the fourth or fifth thoracic vertebrae, that is, about half way up in this area.

Mr. Davis:

Q. Test his reflexes?
A. And on the reflexes or extremities we didn't find any shortening in the legs, but on the reflexes, they were decreased at the time we examined him Saturday, there was a decreased knee reflex and no babinsky.

Q. Now, by a knee reflex is meant by putting the knee over the table——

A. To crossing your knee in this manner and hitting this nerve right under the knee cap, and there is a reflex there; if you are normal, you have a certain kick to your foot.

Q. That is, the foot comes up?

A. The foot comes up.

Q. And if it comes up quickly, it is exaggerated?

A. Yes.

Q. Now, the babinsky is by scratching the sole or foot?

[fol. 93] A. By scratching the sole or foot and you get a quick response on the toe.

Q. That is, there is a contraction?

A. There is a contraction of the big toe, and the big toe is the most important.

Q. And was that totally absent in this case?

A. That was totally absent in this case. And also when you do that as a part of that babinsky, some times you won't get a reflex here, but you will get one in this extensor group of muscles.

Q. What did that indicate to you?

A. There is an entire absence of that reflex.

Q. Now, there being an entire absence of that reflex, what did that indicate with reference to his physical condition, if anything?

A. That the arc is entirely destroyed on that side.

Q. And did you examine the X-rays that Doctor Sheldrop had?

A. Yes, sir.

Q. Handing you exhibits one and six——

Mr. Stringer: Mr. Davis, before you go on, I don't know as these were formally offered in evidence.

The Court: They were not offered, Mr. Davis.

Mr. Davis: Well, I offered them in evidence.

Mr. Stringer: It is the understanding they are in evidence.

Mr. Davis: All right.

The Court: That is numbers one to seven inclusive?

Mr. Davis: Yes.

Q. Handing you exhibits one and six, will you examine those and state whether or not they show any fracture of this man's spine and vertebræ?

[fol. 94] Mr. Stringer: Which exhibit are you referring to?

Mr. Davis: Well, I am going to find out just as soon as he——

Q. And you are now holding in your hand exhibit six?

A. Well, this exhibit doesn't show the fracture of the——

Q. I think that is right.

A. Yes, this is the picture taken from the side of—from this way, the lateral picture.

Mr. Stringer: Which exhibit is this?

A. That is exhibit one. The first fracture of that vertebræ. You can see it is a fracture, because it is so much thinner than the rest of the vertebræ.

Q. Where is the first one?

A. Right there.

Q. This space here is less than the space between the other vertebræ?

A. No; the vertebra itself occupies less space and shows it has been pulled together in that manner.

Q. What effect does that have on the man's back and spine there?

A. Well, you would—I think there would be pressure on the cord at that place, and if there is enough pressure it will cause degeneration of the nervous tract.

Q. With reference to his condition of the back and spine and taking into consideration the physical examination you made, as well as what is disclosed by the X-ray, are you able to state whether or not he has sustained a fracture of the first dorsal vertebra?

[fol. 95] A. He has.

Q. State whether or not, from your convenience as a physician and surgeon, that is a permanent injury?

A. That is a permanent injury.

Q. And from the examination you have made of him, and assuming the condition you have found there, that he has worn this jacket and suffering pain from the condition, and also taking into consideration the condition as you found from the X-ray, in your opinion, will he ever be able to do manual labor?

A. Not heavy manual labor.

Q. Why?

A. Well, because he has got a loss of motor function to his—to these extremities, his lower extremities, which shows a degeneration at the present time. It is a question whether it will not progressively get worse.

Q. You may state from your experience as a physician and surgeon whether such conditions often do get worse?

A. They do.

Q. Does that tend to predispose one toward tuberculosis?

Mr. Stringer: Objected to as leading.

Mr. Davis:

Q. Well, what does this predispose one to?

A. Well, it causes simply a lessened—if there is a deterioration of this nervous tract, it simply deteriorates more and he will have less functioning of the nervous extremity.

Q. Do you find any impairment of feeling or numbness in his left leg?

A. He has practically the same sense, impairment of sensitiveness [fol. 96] over the entire trunk to this point. It is diminished, not entirely.

Q. And is that one of the evidences to an injury to the spinal cord?

A. Yes, sir.

Q. And could such an injury as he sustained bring about this condition, in your opinion?

A. It could.

Q. Doctor McIntyre, the testimony shows he has suffered from headaches and dizzy spells from the time of the injury to the present time, and still suffers from that, and was unconscious from Sunday noon when he was injured until around Wednesday morning. In your opinion, what took place, as a physician and surgeon, what do you say took place to produce any unconsciousness?

A. Why, I would think that he probably had a concussion of the brain at the time of his injury.

Q. Does concussion of the brain produce unconsciousness?

A. It does.

Q. Lack of unconscious, is that a factor upon passing upon the character of the accident, the concussion, as a rule?

A. It is a rule; you would think it would be.

Q. I think that is all.

Mr. Davis: You may take the witness.

Cross-examination.

Mr. Stringer:

Q. In diagnosing the case, Doctor, there are two kinds of symptoms that you go on, objective symptoms and subjective symptoms,—am I correct?

[fol. 97] A. Yes, sir.

Q. Objective symptoms are what you can see or feel, or which the X-ray reveals. Would you answer, so the reporter can get it? You nodded your head, Doctor, but the reporter——

A. Yes.

Q. And subjective symptoms are the symptoms which the patient tells you about?

A. Yes, sir.

Q. Now, of course, there is no question but what some of his ribs were broken, in this unfortunate accident, but as I understand you, those ribs have healed?

A. The ribs have healed with a slight deformity in the line of the fracture.

Q. Yes, but as Doctor Sheldrop told us on Saturday, this will cause him no trouble?

A. I don't think it will.

Q. You agree with that?

A. I will agree with that testimony.

Q. Now, all the scars on his head and back have healed, have they not?

A. Yes, sir.

Q. And his burns have healed?

A. Yes, sir.

Q. And with the exception of the X-ray photograph there is no objective symptom showing anything the matter with his back?

A. Yes; I think he has a slight rotation of his spine, of the spinous process.

Q. Well, what do you mean by that?

A. That they are out of line. There is——

Q. Well, a slight curvature of the spine, which Doctor Sheldrop mentioned on Saturday also, which he said he couldn't tell what it came from, and you agree with that, I take it?

[fol. 98] A. I agree with that, but he has this curvature.

Q. You don't know what caused that?

A. No, I don't.

Q. Well, you will have to answer, so we get it in the record.

A. No.

Q. It may have been from any number of things. Now except the X-ray picture there is nothing, no objective symptom showing anything the matter with his back?

A. Only the reflexes that you are unable to——

Q. I am speaking of an examination of the back itself, you find nothing the matter that you could lay your hands on except what is shown by the X-ray picture?

A. No.

Q. Of course, you didn't take these X-ray pictures yourself?

A. No, sir, I did not.

Q. Doctor Sheldrop brought them down with him?

A. Yes, sir.

Q. And you and he went over them together?

A. Yes, sir.

Q. And he pointed out to you what he found in these X-ray pictures and you looked at them?

A. He didn't point out to me; he gave them to me and asked me what I could find.

Q. And you are of the opinion that there is a fracture of one vertebra?

A. Yes, sir.

Q. And you reached that conclusion from an examination of the X-ray?

A. In conjunction with the physical examination.

[fol. 99] Q. Now, vertebræ are a great many different shapes, aren't they?

A. Yes, sir.

Q. Some are square, some are pointed, and some are narrow and some are broad, are they?

A. Well, there is a difference in vertebræ as to their location, whether cervical, thoracic or lumbar vertebræ.

Q. And there is a difference of vertebræ in the same location in different people, are there not?

A. Yes, sir, some difference.

Q. In other words, you may have a vertebræ which is narrower than the other vertebra and narrower than the same vertebra in another person and yet that would be perfectly normal, would it not?

A. Why, you could have narrower vertebræ in different individuals that would be different, but——

Q. Yes; and the man——

Mr. Davis: Wait a minute. Let him finish the answer.
Mr. Stringer: I am examining this witness.

A. I would like to qualify that, because it is——

Mr. Davis: You might be fair.

A. There is a marked difference—there is not a marked difference in the size of the vertebra there is in this picture.

Mr. Stringer:

Q. As a matter of fact, it is almost impossible to obtain and find a spine where all the vertebræ are absolutely perfect,—isn't that true?

A. Well, I am not qualified to say.

[fol. 100] Q. Well, that is what—you haven't had very much experience on the shape of these vertebræ then, Doctor?

A. Well, I have looked at quite a few.

Q. Well, now, getting back to my old question, you don't know whether it is a fact that it is a hard matter to find any spine in any man where all the vertebræ are perfect in shape? Isn't that true?

A. Oh, I don't think it would be so hard.

Q. Well, at any rate, a great many perfectly normal people have vertebræ which vary in shape from the usual shape of vertebræ in other people?

A. They vary within normal limits.

Q. And sometimes they are square and sometimes they are pointed and sometimes they are narrow and sometimes they are broad?

A. Well, that is awfully ambiguous, on the spine or on vertebrae, I don't know whether——

Q. Well, vertebræ vary in shape and size the same as a man's head?

A. Yes, they vary in size, but it is due to the location?

Q. Now, the reason you say there is a fracture of this vertebræ, this particular one which you pointed out, appears to be narrower than the others?

A. Well, it is narrower and it shows the compression—impacted fracture.

Q. Well, what you say shows an impacted fracture on account of its shape as it appears in the picture?

A. Shape, yes.

Q That is the only evidence of a fracture which you see?

[fol. 101] A. Well, in the X-ray picture?

Q. Yes.

A. In the contour all the way around of the vertebræ?

Q. Yes.

A. Yes.

Q. And because that vertebra is a little different shape than the rest, you say it is a fracture. I am right on that, am I?

A. You are.

Q. Of course, in this X-ray you can't see any fracture?

A. Yes, sir.

Q. You are going on the shape of the vertebra?
A. Well, there is no crack running through it that is evident at this time.
Q. And there is no piece broken off?
A. Well, it shows where a piece has been scooped out on the top. It is pathologically known that such a fracture will give that picture.
Q. You are not, of course, an expert on the spine contour; you haven't specialized on it?
A. No, I haven't specialized.
Q. What is your speciality, or have you one?
A. Well, I am practicing general medicine.
Q. Are you engaged in surgery?
A. Yes, sir.
Q. That is all.

Redirect examination.

Mr. Davis:

Q. Doctor, with reference to this ex-ray of the spine, the suggestion has been made that any spinal—if you will look up here again. This is the spine, is it?
[fol 102] A. Yes, sir.
Q. Now, is that the right position?
A. Yes, sir.
Q. Now, then, this impacted fracture appears at what point?
A. At this point right here (indicating).
Q. Up where to where?
A. Well, it starts in and comes down to here. That should come right straight across on this whole area. That is pushed together and this has been taken out.

Mr. Stringer: I move to strike out the answer as not responsive to any question.
Mr. Davis: Oh, I think it is.
The Court: Motion granted.

Mr. Davis:

Q. Tell the jury where this shows clearly an impacted fracture and not a normal condition on that one.

Mr. Stringer: I object to that as argumentative.
The Court: Objection sustained.

Mr. Davis:

Q. Just show them where the impacted fracture is and explain that to them.
A. The fracture is in the first dorsal lumbar at this point where it is scooped out, and it shows where the injury came it is pushed right together, that is, the bone itself is just pushed right down and the structure of the vertebra is spongy on the inside, and when you

have an injury to it, it compresses it together, and they call it a compressed fracture of the vertebra.

Q Now, Doctor, where such a condition as this is normal, do you expect to find any paralysis of the left leg?

[fol. 103] Mr. Stringer: I object to that as immaterial and assuming facts not in evidence.

Mr. Davis: They have gone into it.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

A. What was the question?

Q. If this were a normal condition, would you expect to find any impairment of the motion or use of the leg at all?

A. You wouldn't expect to find any.

Q. Would you expect to find where it is a normal condition that there would be any impairment of the use of the back or any pain in his back?

A. No, sir.

Q. Where it is normal, would you expect a fairly average doctor to put on a corset or something to keep the back in place?

A. No, sir.

Q. That is all.

Mr. Stringer: That is all.

Mr. Davis: Plaintiff rests.

Mr. Stringer: We will waive the opening to the jury and call Dr. Post.

Carl M. Post, called and sworn as a witness for and in behalf of the defendant, testified as follows:

Mr. Stringer:

Q. Doctor Post, where do you live?

A. Des Moines, Iowa.

Q. And what is your business or profession?

A. I am practicing surgery.

[fol. 104] Q. How long have you practiced your profession?

A. Since 1913.

Q. And where did you receive your medical education?

A. Drake Medical College, Des Moines, Iowa.

Q. And what has been your experience in the line of your medicine? Where have you practiced?

A. Des Moines, Iowa.

Q. Prior to the time that you became a physician and surgeon what was your profession?

A. I was an osteopath.

Q. How long did you practice that profession?

A. Four years.

Q. And what does the study of and practice of the profession of osteopathy include?

A. Specially a careful study of the spine and the vertebra in particular.

Q. And you have, I believe you state, in 1913——

A. Graduated from medicine, but it was 1907 in osteopathy.

Q. And since that time you have been practicing your profession at Des Moines?

A. Yes.

Q. Are you a surgeon of the Rock Island road at that point?

A. Yes.

Q. How long have you occupied that position?

A. Since 1914.

Q. Have you had experience in respect to injured spines?

A. Yes.

Q. To what extent have you had that experience?

[fol. 105] A. Quite extensive.

Q. Are you acquainted with the plaintiff, Fred A. Elder?

A. Yes.

Q. When did you first meet him?

A. February the 5th.

Q. And where did you see him?

A. At Chariton, in the hospital.

Q. You were called down there to——

A. I was.

Q. Examine the man injured in this wreck?

A. Yes.

Q. And when did you next see him?

A. May the 5th.

Q. Of 1923?

A. Of 1923, yes.

Q. Where did you see him at that time?

A. At my office in Des Moines.

Q. And where did you see him after that?

A. June the 7th and 8th, at my office.

Q. Well, did you examine him again today?

A. I did.

Q. Now, will you please tell us at the time of your examinations what the man was suffering—what complaints he made, if any, and what he was, in your opinion, suffering from—from the first examination?

A. At the first examination the man was—I saw him in the hospital. He was in an unconscious or semi-comatose condition. He could be aroused to a slight degree by attempting to move his body. He had a first degree burn from about the—a little above the middle of the back to about the middle of the under surface of the thighs. [fol. 106] That was just to the back. He had a small wound to the left sub-occipital region and several minor little cuts and bruises, not to any great extent. He complained, especially when attempting to palpitate the chest, of considerable soreness on his left side so we assumed there were probably fractured ribs in that side, and his

condition was such for a day or so there was no particular need of rushing him for X-ray, so he was not moved at the time I was there.

Q. I take it at that time the conditions were such you couldn't make a very complete or satisfactory examination.

A. No.

Q. You next saw him in May at your office?

A. Yes, sir; May 5th.

Q. Will you tell us what he complained of at that time and his condition, as you found it?

A. At the time of May 5th he complained of distress, especially in the front part of the chest, and soreness around in the middle of the back, high up between the shoulders, in what we call the mid-dorsal region; he complained of—regarding this pain, especially if he was standing, or things of that kind. He had at that time a corset that somebody had given him, some man that had had a broken back, that had formerly used the corset and, he said, was not using it now, and he was wearing this corset. It seemed to fit him fairly well and he said it gave him a support to his chest. There was no complaint made on the lower part of his spine at that time. I went over examining his reflexes; his reflexes were practically normal—patellar and the angloclonosis reflexes—but he did have con- [fol. 107] siderable soreness in the immediate dorsal region and around on the left side where the ribs were fractured.

Q. Now, did you see an X-ray of him at that time?

A. Yes. Doctor Borgem X-rayed.

Q. And that X-ray showed that the ribs had been broken?

Mr. Davis: Just a moment. Where is the X-ray?

Mr. Stringer: It is right here.

A. Have you that X-ray?

Q. There is no question about his ribs having been broken?

A. Oh, no.

Q. And had they at that time united?

A. Had what? Yes, there was union.

Q. And what sort of a union was it?

A. Perfectly good union.

(X-ray marked defendant's Exhibit "C.")

(X-ray marked defendant's Exhibit "D.")

Q. You have produced here in court, Doctor, two X-rays, which you used in making your diagnosis at that time.

A. Yes.

Q. They are marked defendant's Exhibits "C" and "D," and also marked defendant's Exhibit "E." Is that one of ours, or one of yours?

(X-ray marked defendant's Exhibit "E.")

Q. Now, what is the fact as to whether there is any material difference between the pictures you had, so far as the ribs are concerned, and the pictures which the plaintiff has introduced here in ev-dence?

A. Not any. Their pictures are probably a little bit clearer of the spine.

[fol. 108] Q. So far as the ribs are concerned, is there any material difference or——

A. No, sir; just about the same thing.

Mr. Stringer: Did you wish those introduced in evidence?

Mr. Davis: Yes, I wish those introduced.

Mr. Stringer:

Q. Now, what, in your opinion, has been the recovery from those broken ribs?

A. There is good union in the ribs.

Q. State whether or not, in your opinion, the fact that those ribs were broken is going to in the future cause him any material disability?

A. No.

Q. At the time of your examination in May, state what the condition of his back was with respect to burns and bruises.

A. There was an abrasion, that is, healed scar, around the region of the first or second lumbar and one over the upper cloteal region, I think, on the left side. They were just superficial.

Q. Well, as I understand you then, the burns had healed or not?

A. Yes, pretty well healed.

Q. And had these wounds, the external wounds healed?

A. Yes.

Q. Now, did he at that time complain of any pain in the region of the spine?

A. In the mid-dorsal, up above.

Q. Where is the mid-dorsal region?

A. Up about here to here.

Q. Just below the shoulder blades?

A. Below the shoulder and between the shoulder blades.

Q. He complained of pain there?

[fol. 109] A. Yes.

Q. And did you reach any conclusion as to the cause of that pain?

A. That was probably due at that time to the fractured ribs.

Q. Well, that would be your opinion?

A. Yes.

Q. Now, did he complain of any pain in the lumbar region?

A. No.

Q. You were in court this afternoon when Doctor McIntyre testified?

A. Yes.

Q. You were not, I believe, here the other day, however, when Doctor Sheldrop testified?

A. No, I was not.

Q. You did not, I believe, take any pictures of his spine in the lumbar region at that time?

A. No.

Q. Have you ever had a picture taken of that?

A. No.

Q. And why didn't you take a picture?

Mr. Davis: Now, that is calling for the conclusion of the witness and self-serving. Well, go ahead. I withdraw my objection. Answer it.

A. There was not any symptoms in that region expressed by the patient or found on palpation, so there was no reason for it.

Mr. Stringer:

Q. Now, did you make another examination of him in June?
A. June the 7th and 8th.
Q. Now, state the condition you found him in at that time?
A. His general condition seemed to be somewhat improved at that [fol. 110] time and he still complained somewhat of distress and was wearing this corset affair, and at that time he stated that the corset seemed to cause him some distress, so that he wasn't able to wear it part of the time, that it seemed to hurt the sternum.
Q. Did he at that time complain of any pain in the lumbar region?
A. No, he did not; only the mid-dorsal region and chest.
Q. Now, you examined him again today, did you not, Doctor?
A. Yes, sir.
Q. In Doctor McIntyre's office?
A. Yes; with Doctor McIntyre present.
Q. During the noon recess?
A. Yes.
Q. Now, what did you find? Just describe what your examination was and what symptoms he——
A. The examination of the head practically normal; the patellar reflexes practically normal; and the contour of the chest shows a long lateral curve, which is quite commonly found in a right-handed person, a left-handed individual having it on the opposite side; you could feel the calluses over the united fractures of the ribs, and we noticed on the examination of the back the slight superficial scars which are present. The examination of the abdomen was practical- negative; the scrotal reflex was apparently about normal; the patellar reflex on both legs were normal.
Q. What is the patellar reflex?
A. Striking the knee and getting response. They were just—and [fol. 111] both the right and the left leg would respond the same way. The babinsky—we didn't get a babinsky.
Q. What is a babinsky?
A. The babinsky is one of the reflexes, which is especially pronounced with spinal region injuries to the spinal cord. It is produced by scratching the sole of the foot along the inner side. It indicated that there was not any spinal cord injury.
Q. If there had been a spinal cord injury, what would you expect to find?
A. You would have got the reflexes with the babinsky sign.
Q. Now, did you examine the X-ray plates that Doctor Sheldrop brought down with him?
A. Yes.

Q. When did you examine those, Doctor?
A. This morning.
Q. Now, will you examine again, Doctor, plaintiff's Exhibit One? You also examined it this morning, Doctor?
A. Yes.
Q. And since that time you have examined the man?
A. Yes.
Q. I will ask you whether or not that X-ray picture shows any fracture of the spine?
A. No positive evidence of a fracture of the spine.
Q. You heard Doctor McIntyre's testimony?
A. Yes.
Q. In which he pointed out what he thought was an injury to one of the dorsal vertebræ?
A. Yes.

[fol. 112] Mr. Davis: Not what he thought; what he said it was.

Mr. Stringer:

Q. Do you find that indicated on that X-ray?
A. The first lumbar vertebra is somewhat of a wedge shaped vertebra. There is a lipping of the twelfth dorsal which extends slightly down here and a corresponding faucet-like depression of the first lumbar, which is quite characteristic of different people. You will find all kind of variation of lipping. There is the spinal canal through which the spinal cord runs, apparently is not disturbed, so that there is no evidence that you can see, if there would be any infringement or pressure upon the spinal cord. The wedge shape, slight wedge shape, shaping toward his lumbar vertebra, is not at all uncommon to find in almost any individual.
Q. Well, then, in your opinion, Doctor, in your examination and from the examination of that X-ray, has this man a broken vertebra or not?
A. No; he had—at no time have I seen him with the symptoms of what would indicate pressure upon the cord and the evidence of a fractured vertebra.
Q. Well, is there any evidence that you know of of a fractured vertebra?
A. No.
Q. In your opinion, has he a fractured vertebra?
A. No.

Mr. Stringer: You may inquire.

[fol. 113] Cross-examination.

Mr. Davis:

Q. In your opinion, did he ever have a fractured vertebra?
A. No; not any symptoms that I could find at the time.
Q. Doctor, looking at this X-ray, I will ask you this question—answer yes or no—isn't it a fact that in this X-ray, where the first

dorsal appears, that that condition shows the same as it might be brought about by a fracture as well as by normal condition? Can you answer that by yes or no?

A. No; if you refer to the body of the vertebra, the whole vertebra.

Q. I am speaking about the lessened space on the body of the vertebra, is there any indication that it may have been?

A. No, not positive, because you have to take the body of the vertebra and the lateral surface and the——

Q. Now, Doctor, what does the lacking of this space indicate, if anything?

A. An anomally or peculiarity in the individual.

Q. Do you always find that anomally after a man's in a railroad wreck?

A. No; you can find it in those not injured at all.

Q. Would you expect after a man has been injured, shortening that be an indication, shortening of space had been due to an injury?

A. If that was the region that was injured.

Q. Now, Doctor, you did not take an X-ray of that man's spine, did you?

[fol. 114] A. No.

Q. He came to you in May and complained of pain in the mid-dorsal region?

A. Yes.

Q. And isn't it a fact that if there had been an impacted fracture there that that pain might have reference to just where he complained of it there?

A. No.

Q. Not necessarily. Isn't it a fact that it would be?

A. No. If he had an impacted fracture of the first lumbar vertebra, he would probably have disturbance of the—intervention of the first lumbar nerve or the twelfth dorsal nerve.

Q. Do you know whether any X-rays were taken at the hospital?

A. I don't know whether any X-rays were taken at the hospital?

Q. Didn't you know that Doctor Yokum did take some there?

A. I don't know.

Q. You didn't inquire about that as surgeon for the Rock Island?

A. It wasn't my business.

Q. This man came to you in May and June?

A. Yes.

Q. You never at any time, did you, take an X-ray of his spine?

A. The spine to a certain degree is his neck.

Q. Now, Doctor, if this is an impacted fracture, as McIntyre and Sheldrop say, isn't it a fact that an X-ray taken earlier and closer to the injury would be shown out more clearly the point of fracture or fracture?

[fol. 115] A. Yes.

Q. And you took none of his back so as to show the first lumbar?

A. No.

Q. Now, Doctor, did he complain to you of pains in the pelvis?

A. No.

Q. Not at any time?

A. Not in the pelvis.
Q. And did you take an X-ray of his pelvis?
A. No; he didn't complain of any pains in the pelvis.
Q. When he first came to you, did he have this corset on?
A. Yes; I think he had that on the first time.
Q. Who took those X-rays you produced?
A. Doctor Burgem.
Q. Were they taken in your presence?
A. No.
Q. He took them; they were not in your presence?
A. No. They were taken April the 16th, and that was a month before I examined him. It was at Doctor Burgem's office. Doctor Burgem does nothing but X-ray work in Des Moines.
Q. Now, when you examined him today, did he complain of pain in the dorsal region?
A. Yes; all along.
Q. Did you test him by having him stoop over and try to straighten up?
A. Yes.
Q. Did he exhibit any difficulties in doing so?
A. He stooped to about a slight angle and gradually straightened up, apparently with some difficulty.
[fol. 116] Q. Now, then, in the different times that you have examined him, I will ask you to state whether or not—I will ask you if you found him at any time anything but frank and free in disclosing his condition?
A. Yes, he seemed to be perfectly willing.
Q. And, Doctor, he has testified that for the past year he has had pain, a continuous pain in the dorsal region, and that he has pain now there. Assuming that to be true, that he has had that pain in that region, and then taking into connection with it the X-ray picture, wouldn't you then say that that would be any question of an injury to the spine, assuming those things to be true?
A. It would be an injury to the upper portion of the spine in the lumbar region.

Mr. Stringer: You said dorsal.

Mr. Davis:

Q. The first lumbar region, assuming that there had been in that region, then taking into consideration the X-ray and that that pain, assuming that it had continued for years and still bothered him, you would then say that there was any question of an injury and fracture to that spine?
A. Assuming that you would make that statement about pain to examination with the patient——

Mr. Davis: I move that the answer be striken out, because I stated, assuming those things to be true.
Mr. Stringer: He has a right to answer the question, and I submit he was doing so.
The Court: Strike it out, if counsel——

Mr. Davis:

Q. Doctor, just understand the question and then answer it with-
[fol. 117] out any explanation. Assuming that his testimony is true, if you can, Doctor, that he could tell the jury——

A. Yes.

Q. That he has suffered pain in that region of the first lumbar for the last year, that that pain has been practically constant, and assuming the condition you found in the X-ray, I will ask you then if it is not a fact that, in your opinion, you would have to say that he sustained an injury to the first lumbar vertebra? You may answer that by yes or no.

A. No; that isn't an injury sufficient to cause compression of the cord or nerve symptoms.

Q. Would you say that there had been no injury to the first lumbar vertebra, assuming his testimony to be true and taking into consideration the X-ray?

A. Not any more than the other, the upper dorsal.

Q. Not any more. That is all.

Mr. Stringer: That is all.

Sam Woods, called as a witness for the defendant, testified as follows:

Mr. Stringer:

Q. Mr. Woods, you are the engineer in charge of this train. What time did you leave Chariton in the morning?

A. We left about—we left Chariton about 8:45.

Q. When you were doing work of this kind, what is the fact as to whether you received an order before you left?

[fol. 118] A. We do receive an order before we leave.

Q. And did you receive such an order that morning?

A. We did.

Q. And when did you receive that order?

A. When we went to work.

Q. About what time?

A. Along about seven o'clock, if I remember right.

Q. Have you that order with you?

A. I have.

Q. Will you produce it?

(Train order marked defendant's Exhibit "F.")

Q. I show you defendant's Exhibit "F" and ask you, Mr. Woods, whether that is the order which you received when you went to work in the morning and pursuant to which you were working that morning?

A. It was.

Mr. Stringer: I offer it in evidence.
Mr. Davis: No objection.

(Defendant's Exhibit "F" read to the jury by Mr. Stringer.)

Mr. Stringer:

Q. Did you at any time during that morning receive any other order?
A. I did.
Q. With respect to the work that should be done that morning?
A. No, sir.
Q. What is the fact as to whether that was the order upon which you were working that morning?
A. What was the fact of it?
[fol. 119] Q. Yes. Is that the order on which you were working during that morning?
A. That is the order that we made our movement from to the mine on, yes, sir, to Pershing siding.
Q. Now, after one p. m. what would be necessary in order that you would do any work?
A. We would have to receive more running orders from the dispatcher.
Q. And who is it issues all these orders?
A. The dispatcher.
Q. I see that order expires at one p. m. Had you ever received an order for any work to be done after one p. m. that day?
A. No, sir.
Q. What is the fact whether or not when you got back to Chariton you would have received orders what to do in the afternoon?
A. Yes, sir.
Q. Do you know what you were going to do in the afternoon?
A. I do not.

Mr. Stringer: You may inquire.

Cross-examination.

Mr. Davis:

Q. Did you go in to get water?
A. We were going to Chariton for water and dinner; yes, sir.
Q. Now, then, so far as this order is concerned that has been introduced, that is a running order for you to have the right to go onto the main track and from there on to Pershing siding?
A. Yes, sir.
[fol. 120] Q. This order doesn't contain a direction to what you were doing at the mine?
A. No, sir.
Q. So far as this is concerned, it doesn't?
A. It doesn't have nothing to do with only the movement of the train from Chariton to Pershing.

Q. Yes; it is your right to go out on the main line?
A. Yes, sir.
Q. And then you received another order, that day, didn't you?
A. I received——
Q. Produce it.
A. There is the orders I received that day.
Q. Now then, handing you Exhibit Eight, that is an order that you received before you went into Chariton, isn't it?
A. Yes, sir.
Q. And you would have to receive that order in order to get the right to go on the main line?
A. Yes, sir.
Q. It had nothing to do with reference to what work you were doing at the mine, did it?
A. No, sir.
Q. And none of the orders which you received that day, which you produced, had anything——
A. At the mine; no, sir.
Q. Of course, the conductor would be the one knowing what work would be done at the mine?
A. Yes, sir.
Q. You wouldn't have any orders as to what work to do at the mine?
A. No, sir.
Q. But any order you receive, you would receive from the conductor as to work at any mine?
[fol. 121] A. Yes, sir.
Q. And that would be given verbally or by signal?
A. Yes, sir.

Mr. Davis: We offer in evidence Exhibit Eight.

Q. So far as you know, you switched those mines a number of times and got to know it?
A. Yes.
Q. If your conductor had orders to switch the mine, you had to go into Chariton for water, he wouldn't have to get another order to finish switching the mine; the only thing he would have to get was an order for the right to get on the main track?
A. As far as I know.
Q. And the orders he got was to have the use of the main line track?
A. That he gave me.
Q. That is the only order you would have anything to do with?
A. Yes, sir.
Q. And that order is obtained in order to safe guard trains on the main line as well as yours?
A. Yes, sir.
Q. And it is part of the general running, immediate work of the railroad in running that main line, isn't it?
A. Yes.

Q. And often times, I will ask you, if you haven't gone to Williamson or Chariton, while switching the mine, and then gone back to finish up in the afternoon? That is frequently the case?

A. Yes, sir.

Q. In fact, that is practically the custom?

[fol. 122] A. Yes.

Q. And you didn't have to, or the conductor, after switching the mine to get another order to switch the mine, would he? You know that, don't you?

A. No, he would give me no orders to switch the mine.

Q. No. And so far as this order is concerned here—this order introduced by Mr. Stringer, Exhibit "F"—that was simply an order giving you the right to use the track at certain times and giving you information of certain trains that had either the right of way or——

A. Yes, sir.

Q. Had nothing to do with the work in along at the mines?

A. No, sir.

Q. And so far as you know, you do know that Mr. Hope intended to go back there, don't you?

A. I don't know anything about that, only what he told me.

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis:

Q. You frequently would leave the mine at noon and go to get water and coming back and switch the mines?

A. Yes, sir.

Q. That was practically the custom of doing the work. You didn't eat your dinner at the mine?

A. No, sir.

Q. Mr. Woods, these switching of the mines you ran your engine?

A. Yes, sir.

[fol. 123] Q. And whatever movements of the cars or the engine in the mines would have to be made—was made on direction from the conductor or brakeman to you?

A. Yes, sir.

Q. And so far as you know, you didn't know whether or not there was any more work to be done at that mine or not, do you?

A. No, sir, I don't know anything about that.

Q. And if the work hadn't been finished, you do know that you would have had to gone back and finished it?

A. Yes.

Q. And you don't know of any order being received by the conductor or that day which told him not to finish the work, do you?

A. No, sir.

Q. That is all.

Redirect examination.

Mr. Stringer:

Q. Before you came out of Chariton after one p. m. would you have had to get another order?
A. Yes, sir; from the dispatcher.
Q. Is there any way of knowing what order you would have got?
A. No, sir.
Q. What is the fact some times you have been told to go to another point?

Mr. Davis: Objected to as leading and suggestive, your Honor.

A. Objection sustained.

Mr. Stringer:

Q. What is the fact as to whether orders are or are not frequently [fol. 124] given to go to another place under a condition of this kind?

Mr. Davis: Objected to as leading and suggestive and calling for the conclusion of the witness.
The Court: Overruled.

Mr. Stringer:

Q. You may answer.
A. Why, Yes; we go by orders of the dispatcher and do different work.
Q. Do you know and have you any way of knowing what work you were going to do in the afternoon?
A. I do not.
Q. That is all.

Recross-examination.

Mr. Davis:

What you mean is this, that if you were going back to switch that mine that afternoon the conductor would have to get an order from the dispatcher allowing him the use of the main line?
A. Yes, sir.
Q. And that is the only order he would have to get from him to finish up that work at the mine?
A. So far as I know, it is.
Q. Yes. You were on the main line when you were hurt?
A. Yes, sir.
Q. And you were inside the main limits at the Pershing yard?
A. Yes, sir.
Q. And you were hit by a passenger train bound from Kansas City?
A. Yes, sir.

[fol. 125] Q. That is all.

Mr. Stringer: That is all.

A. May I take up my orders?

Mr. Davis:

Q. Except those two.

The Court:

Q. What time did this collision take place?
A. Well, the orders was received at that time.
Q. What time did the collision take place?
A. The orders was received at 12:10, as near as I know, after being told, and must have been along about 12:10. I don't know exactly myself.

Mr. Davis: Mr. Stringer says that the engineer desires to retain this Exhibit Eight, because he wants to be held free from blame himself, and they have agreed that I may read it into the record, and it reads as follows: "Work train extra 1574, Pershing, 12:07 p. m., C. Y. H.—that evidently stands for C. Y. Hope—No. 912, engineer unknown and all eastward extras wait at Chariton until 1:30 p. m. All first class trains due Pershing before 12:10 p. m. have arrived or left. Signed, B. T."

Q. One question, Mr. Woods, and you may have this. This notation here of "first-class trains at Pershing, 12:10 p. m., have arrived or left," was part of your order?
A. It was.
Q. And the train which hit you was one of the trains mentioned in that part of the order which hadn't arrived, wasn't it?
A. It was a first-class train that hadn't arrived; yes, sir.

Mr. Davis: Mr. Elder says that should be "engine unknown" instead of engineer unknown.

Mr. Stringer: Now, if your Honor please, we offer in evidence an [fol. 126] exemplified copy of the so-called Workmen's Compensation Act of the State of Iowa, it being pleaded in our answer.

Mr. Davis: I object to that. We object to it as incompetent, irrelevant and immaterial and not within any of the issues in this case.

Mr. Stringer: And I will make my record. And I also offer in evidence an exemplified copy of certain proceedings had before the Industrial Commissioner of the State of Iowa, the same being the body provided for by the Workmen's Compensation Act. This is duly certified to by the Industrial Commissioner and authenticated by the governor of the state, as is the copy of the Workmen's Act. Now, I would suggest that possibly they better be numbered as exhibits.

(Exemplified copy of Workmen's Compensation Act of Iowa marked defendant's Exhibit "G.")

(Exemplified copy of proceedings before the Industrial Commissioner of Iowa marked defendant's Exhibit "H.")

Mr. Stringer: Both exhibits are offered in evidence, defendant's Exhibit "G" being the Workmen's Compensation Act and the defendant's Exhibit "H" being the proceedings before the commissioner.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial, no foundation laid and immaterial under the issues—no part of the issues in this case.

Mr. Stringer: What do you mean by no foundation laid, Mr. Davis,—not properly authenticated?

[fol. 127] Mr. Davis: I don't know. I haven't examined them, and I make that objection in behalf of caution, of course.

Mr. Stringer: Well, now, of course, that is something we have got to discuss with the court. Now, this might be suggested, that the court reserve a ruling on that and we argue the whole proposition together.

Mr. Davis: Well, I am ready to argue that proposition. This is entirely immaterial, as I view it.

Mr. Stringer: Either it is immaterial or it is conclusive, your Honor. We rest, with the understanding that the court is reserving the ruling on it.

Mr. Davis: Well, we expect to rest immediately afterwards, I believe, if the court wishes to hear us on that matter of the admissibility of those documents.

Mr. Stringer: I expect to move for a directed verdict.

The Court: I thought you might conclude your evidence on both sides and then I will hear the matter on this question.

Mr. Stringer: Well, we rest.

Mr. Davis: So do we.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stringer: Now, if your Honor please, the defendant moves the court to instruct the jury to render a verdict in favor of the defendant and against the plaintiff, on the ground that it conclusively appears from all of the evidence that the plaintiff was not engaged in interstate commerce at the time of his injury, and that consequently any remedy that he may have in the premises is provided solely by the Workmen's Compensation Act of the State of Iowa [fol. 128] in proceedings instituted under that Act; and on the further ground that it appears from the proceedings of the Industrial Commission of the State of Iowa that that body has already adjudged——

Mr. Davis: If the court please, that is just what I object about, is placing that—having a motion of that nature before the jury;

that is the vice of it. This is either material or not. If it is material, it is decisive; if it is not material, it is prejudicial error to bring it before the jury.

Mr. Stringer: I have no objection. I think it would be quite proper to excuse the jury.

The Court: You may complete your record after the jury is excused. We will take a recess, and after the recess I will ask you members of the jury to remain in your jury room until the bailiff calls you. It seems to me that is objectionable to hear this argument in the presence of the jury, so you will remain in your jury room until the bailiff calls you. Take a fifteen minutes recess.

Mr. Stringer: What had I said, Mr. Reporter?

(Mr. Stringer's motion read.)

Mr. Stringer: And considered the matter, and acting judicially had adjudged and decreed that the plaintiff in this action was not engaged in interstate commerce, but, on the contrary, was engaged in commerce wholly within the State of Iowa, and that such decision and judgment of the Industrial Commission is res adjudicata—

Mr. Davis: There is no judgment yet, is there? Your record doesn't show that a judgment has been entered, does it?

Mr. Stringer: Not in the courts. Well, let me finish my motion—and binding upon this court, and that said decision and judgment of the Industrial Commission constitutes a judgment and a [fol. 129] judicial proceedings of the State of Iowa to which this court, under the Constitution of the United States, must give full faith and credit, and in the event the court should refuse to give faith and credit to said decision of said Industrial Commission, it will operate to deny this defendant of its rights in the premises as guaranteed to it by the Constitution of the United States, and a failure of this court to hold that said judgment is res adjudicata will operate to deprive this defendant of said constitutional rights and operate to violate the Constitution of the United States. Now, if your Honor please, I take it now there is now before the court a motion to direct a verdict and also a ruling upon these exhibits which have been introduced in evidence.

The Court: Both may be considered together.

(Argument by both counsel.)

The Court: I think the question as to whether the plaintiff was or was not engaged in interstate commerce should be submitted to the jury as a question of fact. The objection of the plaintiff to Exhibits "G" and "H" will be sustained and the motion of the defendant for a directed verdict will be denied. In case that the jury should find that the plaintiff was engaged in intrastate commerce, that would, of course, end the case. If the jury finds that the plaintiff was engaged in interstate commerce, then you go to the question of damages. If they answer the first question in the negative and say that the plaintiff was not engaged in interstate commerce, that ends the case.

Mr. Stringer: May we have an exception to the ruling?

The Court: Exception may be noted upon the part of the defendant.

[fol. 130] CHARGE TO JURY

MEMBERS OF THE JURY: This action was brought by Fred A. Elder as the plaintiff against the Chicago, Rock Island & Pacific Railway Company as the defendant under what is known as the Federal Employers' Liability Act, an act of Congress affecting men and people who work for the railroads engaged in interstate commerce, that is, commerce between several states, and this action, as I say to you, was commenced in this court and was tried in this court under that act of Congress, and you members of the jury have been selected to try the facts in the case and determine what the facts are relative to the issues that will be submitted to you between this plaintiff and the defendant.

The plaintiff claims in his complaint that the plaintiff and the defendant at the time of the accident in question were engaged in what is called interstate commerce, that is, that they were engaged in the operation of the defendant railroad between several states, and that the work in which they were engaged in was not entirely within the State of Iowa, where this plaintiff resided and where the accident in question took place. The defendant denies that the plaintiff and the defendant at the time in question were engaged in interstate commerce, and you members of the jury will be asked to determine that question and that issue, and that is the first question that it will be convenient for you to determine in this case.

I am giving plaintiff's request number one, two and three as a part of the law in this case.

"One of the first questions for you to determine in this case is [fol. 131] whether at the time plaintiff met his injury, both plaintiff and defendant were engaged in interstate commerce.

"If you find that at that time plaintiff was not engaged in interstate commerce, then he cannot recover in this action, and your verdict will be for the defendant. On the other hand, if you find that at the time in question, plaintiff was engaged in interstate commerce, you would find for plaintiff on that issue and then proceed to determine the other issues in the case as the court will give them to you.

"It is undisputed that the defendant in this case, the Chicago, Rock Island & Pacific Railway Company, is an interstate carrier by railroad, and generally engaged in interstate commerce. The defendant contends that at the time plaintiff was injured, defendant was engaged purely in work not interstate in character and that the defendant and plaintiff were engaged wholly in intrastate commerce.

"It is a question for you to determine from all the evidence in the case whether or not the work in question was interstate at the time plaintiff was injured. An employee is engaged in interstate commerce when he is working directly with or about interstate cars or shipments; that is, cars or shipments going from one state to another. An employee may also be engaged in interstate commerce even

though he be not working about such cars or shipments at the precise time he was injured, if his work so closely and intimately connected with the general interstate work of the carrier as to be deemed, in law, a part of it.

"In other words, was the work of the employee, the plaintiff [fol. 132] Elder, at the time of his injury, so closely related to the general interstate work of the railroad company as to be practically a part of it? Was his work being done independently of the general interstate commerce in which the defendant was engaged? Was his work a matter of indifference, so far as the general interstate employment of the defendant was concerned?

"These are questions which you should determine from all the evidence which you have listened to in this case relative to the work being done at the time and just before plaintiff was injured. If, after a review of all this testimony, you are of the opinion that plaintiff's work had no relation to the general interstate work of the carrier, and that he was not engaged in interstate commerce, then your verdict should be for the defendant on that issue, and that would end the case.

"On the other hand, if you believe from this evidence that the plaintiff's work was so closely connected with the general interstate work of the railway company as to be deemed a part of it, and if you believe that such work was not a matter of indifference to the defendant, and was not being done independently of its interstate commerce, but that it was in fact so closely related to defendant's general interstate work as to be practically a part of it, then your verdict should be for the plaintiff on that issue, that plaintiff and defendant were at the time engaged in interstate commerce.

"Plaintiff bases his right to recover in this case on a certain Act, or statute of Congress, known as the Employers' Liability Act. This statute, so far as is here material, provides as follows:

[fol. 133] " 'Every common carrier by railroad while engaging in commerce between any of several states, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'

"If you find, within the rule previously given you, that plaintiff and the defendant were engaged in interstate commerce at the time plaintiff was injured, then the rights of the parties are governed by this law of Congress.

"Under this Act the defendant would be liable to the plaintiff for any act of carelessness or negligence proximately resulting in injury to plaintiff, if such acts were done or performed by any agent, servant or employee of the defendant; that is, the defendant is liable for the acts of any of its agents, officers or servants.

"An employee returning from or going to work which is interstate in character is, while so doing, engaged in interstate commerce and

within the protection of the Employers' Liability Act of Congress, if injured while on the premises of the employer."

Now, that will be the first question for you to decide, and as I have stated to you under these instructions, if you find that the plaintiff and the defendant in this case at the time of the accident in question were engaged in interstate commerce, then you answer that question [fol. 134] in the affirmative. Then you will go to the question of damages, and in that event your verdict will be for the plaintiff. If you say that the plaintiff was engaged in work wholly within the State of Iowa, then, or course, your verdict would be for the defendant in this case.

Now, if you find for the plaintiff under the instructions—before you find for the plaintiff under the instructions given, you must find that the plaintiff and the defendant at the time of the accident in question were engaged in interstate commerce by a fair preponderance of the evidence. The burden of proof in this case is upon the plaintiff and he must satisfy you of the claims that he makes by a fair preponderance of the evidence that he was engaged—merce at the time of the accident in question, and by that we mean that the plaintiff and the defendant were engaged in interstate com-that the evidence on the part of the plaintiff upon those claims must weigh more than the evidence on the part of the defendant.

If you find under the instructions given that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident in question, then, as I have stated to you, your verdict will be for the plaintiff, because the defendant in this case admits that the plaintiff was injured at the time in question through the negligence of the defendant Railway Company, and the defendant admits that the injuries which the plaintiff sustained by reason of this accident were the proximate result of the negligence of the defendant Railway Company.

Upon the question of damages, the court instructs the jury that [fol. 135] if you find for the plaintiff in this case, it will be your duty to award to him such damages as will fairly and reasonably compensate him for the injuries he received. In determining the amount of damages to which the plaintiff would be entitled as flow proximately from the accident complained of, it is your duty to take into consideration his age and his condition in life, the physical pain and amount of suffering which he endured, whether his injuries are temporary or permanent, the injuries with which he is afflicted, whether they are temporary or permanent, whether they are temporary or permanent and to what degree, any deformity which he bears, or whether he bears any other marks or scars as the result of this accident. You will also take into consideration whether his earning capacity has been reduced and what effect, if any his injuries will have on his earning capacity in the future. Take all those matters into consideration in arriving at a verdict. If you find for the plaintiff, take those matters into consideration in assessing damages—If you find for the plaintiff under the instructions given. And you are to determine these facts from all of the evidence in the case, all of the evidence that has been produced here in court.

You are the sole judges of the facts in the case. You are the judges of the credibility of the witness. You say what weight you will give to the testimony of each and every witness who has testified here.

Upon the question of damages, the law aims to give the plaintiff fair [fol. 136] compensation for injuries which he received and which are the direct and proximate result of the negligence of the defendant.

Now, take this case, members of the jury, and as I have stated to you, first determine the question whether or not the plaintiff and the defendant were engaged in interstate commerce at the time of the accident in question, and answering that question, as I have stated to you, if you answer it in the negative and say that they were not so engaged in interstate commerce; then your verdict will be for the defendant and that ends the case. If you say that they were so engaged in interstate commerce, then your verdict will be for the plaintiff and you will then go to the questions of damages, and take into consideration in determining these questions all of the instructions the court has given to you as the law applicable in this case and apply the law to the facts and make your findings accordingly.

As I have stated, the burden is upon the plaintiff in this case to satisfy you by a fair preponderance of the evidence of the claims that he makes.

I have prepared two forms of verdict, a verdict for the plaintiff and a verdict for the defendant. Your verdict must be unanimous during the first twelve hours of your deliberations, and if you agree upon a verdict during the first twelve hours, then your foreman, whom you will select after you retire, will insert the date and sign the verdict. If you cannot agree during the first twelve hours of your deliberations, then you may return a verdict if ten or eleven of you agree, but in that event the ten or eleven of you who do agree must [fol. 137] all sign the verdict; but your foreman in that case will not have to sign it.

Are there any ommissions or inadvertencies on the part of the court that counsel would like to call attention to at this time?

Mr. Davis: Well, there was one thing,—I think the court said that if he worked entirely within the State of Iowa he wouldn't be engaged in interstate commerce. I think the court meant to say that if the work that he was doing in connection with the shipment was confined to the State of Iowa.

The Court: That was what the court meant to state, that if the work was entirely within the State of Iowa, and the shipments upon which he was working were solely within the State of Iowa, then he wouldn't be engaged in interstate commerce.

Mr. Davis: No other suggestions.

The Court: There are several exhibits here I omitted to mention in my instructions. You will have those to take to your jury room with you and consider those exhibits in connection with the oral evidence given here in court.

[fol. 138] Plaintiff's Requests

The plaintiff's requests were all given, and are set out in quotation marks in the charge.

PLAINTIFF'S EXHIBIT No. 8

The Chicago Rock Island & Pacific Railway Company.
The Chicago Rock Island & Gulf Railway Company.

Train Order No. 26. Des Moines, Feb. 4, 1923.
To C. & E. Wk Extra 1574
Form) At Pershing
31) X. at 12:09 P. M. C. Y. H. Operator.
No. 912 eng. unknown and all eastward extras wait at Chariton until 1:30 P. M. All 1st class trains due Pershing before 12:10 P. M. have arrived or left.

B. T.
Repeated 12:09 P. M. C. Y. H. Operator
Signed by train made time dispatcher operator Hope Eng 1574
Com 12:09 P. M. J. E. G. Hope

Copy of Original.

[fol. 139] DEFENDANT'S EX. A

C	No. 2		2-4
87544	MR		1181
	FB	84	347
	U Jet		834
C	MR 85		1253
68398	FB U Jet		325
80			928
C 87413	D B	U Jet	
C 86038	D		
C 89252		AR	
MWS 1191	D		
C 82499			
LON 77906	H		
C 88243	F	U Jet	
LON 62565	F	St. Joe	
KCS 27783	F	St. Joe	

DEFENDANT'S EX. B

3-3-24

W		
C 99271	D	Allebre
C 100221	F	U Jet
C 98251	F	

CGN 15533
C 87021
C 82785
C 82324
C 84220
C 84322
C 99750
C
99780
100
C
[fol. 140]
84322
100
C
84220
100
C
82324

C
82785
100
C 99271
C 100221
C 98251
VGN 15533
C 87021
C
82166
100
C
84135
100
LVN 79127
100

KCFSM
73782
100

C
83998
100

F
F
D

D

MR
DB
U Jet
MR
DB
U Jet
MR
DB
U Jet
MR
DB
U Jet
F
F
F
F
MR
DB
U Jet
MR
DB
U Jet
Allerton
MR
HB

LUP
FB

MR

U Jet

95 1274
48
856
96 1411
403
1008
97 1391
415
976
98 1365
413
952
99 1660
482
1178
100 Allerton
U Jet

1444
409
1035
1367
397
970
1466
368
1098

1236
394
842

Olnetz
1366
391
9975

[fol. 141]

EXHIBIT "D"

Manifest Burned Hope Caboose

2-4-23

DEFENDANT'S EXHIBIT F

The Chicago Rock Island & Pacific Railway Company,
The Chicago Rock Island & Gulf Railway Company.
Train Order No. 10. Des Moines, Feb. 4, 1923.
To C. & E. Eng. 1491 and Eng. 1574.
Form At Chariton
19 X. at 6:50 A. M. C. D. M. Operator.
Eng. 1491 and Eng. 1574 work seven-thirty 7:30 A. M. until one 1 P. M. Between Chariton and Williamson protecting against each other and against second 2nd Class trains. All extras West wait at Williamson until one 1 P. M. All extras East wait at Chariton until one 1 P. M.

B. Y.

Made C O M. Time 6:50 A. M. By B. F. Y.
Mortgomery Operator.

Copy of Original.

[fol. 142] DEFENDANT'S EX. G

State of Iowa, Secretary of State

I, W. C. Ramsey, secretary of state of the State of Iowa, do hereby certify that the attached booklet is published and distributed by the authority of the State of Iowa.

I do further certify that Pages 8 to 48 inclusive, of said booklet, constitute and are the statutes of the State of Iowa now in force and in full force and effect on the 4th day of February, 1923, upon the subject of Employers' Liability and Workmen's Compensation as the original statutes remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the secretary of state of the State of Iowa.

Done at Des Moines this 4th day of June, A. D. 1923.

(Seal) W. C. Ramsey, Secretary of State.

Workmen's Compensation Law

[fol. 143] Text of Statute

Title XII, Chapter 8-A, Supplement to the Code, 1913, as Amended by the 37th, 38th and 40th General Assemblies

Part I

Section 2477-m. Employers—Employes—Exceptions.—(a) Presumption—Employes Excepted.—Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions and provisions of this act for any and all personal injuries sustained, by an employe arising out of and in the course of the employment; and in such cases the

employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature. The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or who may be entitled to, benefits from any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city or town.

(b) Compulsory.—Where the state, county, municipal corporation, school district, cities under special charter or commission form [fol. 144] of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

(c) Rejection of Terms—Reasons for.—An employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and (who) in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employe of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employe assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employes in the business;

(2) That the injury was caused by the negligence of the co-employe;

(3) That the employe was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party.

(4) (d) Negligence Presumed—Burden of Proof—Notices of Election to Reject—Presumption on Failure to Give Notice.—In [fol. 145] actions by an employe against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employe was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

Every such employer shall be conclusively presumed to have

elected to provide, secure and pay compensation to employes for injuries sustained arising out of and in the course of the employment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employes by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided. Provided, however, that any employer beginning business after the taking effect of this act and giving notice at once of his desire not to come under the provisions of this act shall not be considered as under the act; provided, however, that such employer shall not be relieved of the payment of compensation as by this act provided until thirty days after the filing of such notice with the Iowa industrial commissioner, which notice shall be substantially in the following form:

[fol. 146] Employers' Notice to Reject

To the employes of the undersigned and the Iowa industrial commissioner:

You, and each of you, are hereby notified that the undersigned rejects the terms, conditions and provisions to provide, secure and pay compensation to employes of the undersigned for injuries received as provided in the acts of the—(thirty-fifth) general assembly known as chapter—(one hundred forty-seven), and elects to pay damages for personal injuries received by such employe under the common law and statutes of this state modified by subdivisions one, two, three and four of section one, chapter—(one hundred forty-seven) of the acts of the—(thirty-fifth) general assembly and acts amendatory thereto.

(Signed) —— ——.

STATE OF IOWA,
—— County, ss:

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the—day of —— 19—, posted at —— (state fully place where posted).

Subscribed and sworn to before me by —— —— this —— day of ——, 19—.

—— —— Notary Public.

The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by [fol. 147] the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

Where the employer and employe have not given notice of an election to reject the terms of this act, every contract of hire express

or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure and pay, and on the part of the employe to accept compensation in the manner as by this act provided for all personal injuries sustained arising out of and in the course of the employment.

Sec. 2477-m1. Wilful Injury—Intoxication.—No compensation under this act shall be allowed for an injury caused:

(a) By the employe's wilful intention to injure himself or to wilfully injury another; nor shall compensation be paid to an injured employe if injury is sustained where intoxication of the employe was the proximate cause of the injury.

Sec. 2477-m2. Rights of Employe—Notice to Reject.—(a) Exclusive of Other Rights—Presumption—Notice.—The rights and remedies provided in this act for an employe on account of injury shall be exclusive of all other rights and remedies of such employe, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury; and all employes affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa industrial [fol. 148] commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer.

(b) Rejection—Procedure—Oath—Form—Undue Influence.—In the event such employe elects to reject the terms, conditions and provisions of this act, the rights and remedies thereof shall not apply where an employe brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereinafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party. The notice required to be given by an employe shall be substantially in the following form:

[fol. 149] Employes' Notice to Reject

To —— —— (name of employer) and the Iowa Industrial Commissioner:

You, and each of you, are hereby notified that the undersigned hereby elects to reject the terms, conditions and provisions of an act for the payment of compensation as provided by (chapter one hundred forty-seven of) the acts of the (thirty-fifth) general assembly and acts amendatory thereto, and elects to rely upon the common law as modified by section three of (chapter one hundred forty-seven of) the acts of the (thirty-fifth) general assembly for the right to recover for personal injury which I may receive, if any, growing out of and arising from the employment while in line of duty for my employer aboved named.

Dated this — day of ——, 19—.

(Signed) —— ——.

STATE OF IOWA,
—— County, ss:

The undersigned being first duly sworn deposes and says that the written notice was on the — day of ——, 19—, served on the within named employer of the undersigned by delivering to —— —— a true, correct and verbatim copy thereof.

—— —— (Name of Person Served).

Subscribed and sworn (or affirmed) to before me by the said —— —— this — day of ——, 19—.

—— ——, Notary Public.

[fol. 150] In any case where an employe or one who is an applicant for employment elects to reject the terms, conditions and provisions of this act, he shall, in addition to the notice required by subdivision (b) of section three of this act, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demands of such person to exercise the right to reject the provisions of this act. And if request, suggestion, or demand has been made of such employe by any person, such employe shall give and state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place when and where made, and persons present, and if it be found that the employer of such employe, or an employer to whom an applicant for employment, or any person a member of the firm, association, corporation, or agent or official of such employer, made a request, suggestion or demand of such employe or applicant for employment to reject the terms, conditions and provisions of this act, such request, suggestion or demand if made under such conditions, shall be conclusively presumed to have been sufficient to have unduly influenced such employe or an applicant for employment to exercise the right to reject the terms of this act, and the rejection made under such circumstances shall be conclusively presumed to have been procured

through fraud and thereby fraudulently procured, and such rejection shall be null and void and of no effect.

No person interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affi- [fol. 151] davit required in case an employe or applicant for employment elects to exercise the right to reject the provisions of this act. And the person administering such oath in making such affidavit shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this act in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated. The Iowa industrial commissioner, or any person acting for such commissioner, shall refuse to file the notice and affidavit, unless such notice, affidavit and certificate fully, and in detail, comply with the requirements hereof. And if such rejection, affidavit and certificate is found insufficient for any cause, (it) shall be returned by mail or otherwise to the person who executed the instrument.

Sec. 2477-m3. Tenure of Election.—(a) Until Provisions Complied With.—When the employer or employe has given notice in compliance with this act electing to reject the terms thereof such election shall continue and be in force until such employer or employe shall thereafter elect to come under the provisions of this act as is provided in subdivision (b) of this section.

(b) Notice—How Filed.—When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject the [fol. 152] provisions of the act and which shall become effective when filed with the Iowa industrial commissioner.

Sec. 2477-m4. Liability of Employer After Election to Reject.—Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof.

Sec. 2477-m5. Subsequent Election to Reject—Security for Compensation.—An employer having come under this act, who thereafter elects to reject the terms, conditions and provisions thereof, shall not be relieved from the payment of compensation to such employe who sustains an injury in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such workman, subject to the approval of the Iowa industrial commissioner.

Sec. 2477-m6. Liability of Other Than That of Employer.—Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and

which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

(a) Proceedings Against Both Parties.—The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

[fol. 153] (b) Indemnity—Subrogation.—If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor.

Sec. 2477-m7. Contract to Relieve not Operative.—No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part from any liability created by this act except as herein provided.

Sec. 2477-m8. Notice of Injury—Form—Failure to Give.—Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employe or someone on his behalf, or some of the dependents or someone on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided, that if the employe or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertance, ignorance of fact or law, or inability, or to the fraud, misrepresenta-
[fol. 154] tion or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form:

Form of Notice

To —— ——:

You are hereby notified that on or about the — day of —— 19—, personal injury was sustained by —— —— while in your employ at —— (give name of place employed and point where located when injury occurred), and that compensation will be claimed therefor.

(Signed) —— ——.

but no variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time at or near a certain place. Notice served upon one (upon) whom an original notice may be served in civil cases shall be a compliance with this act.

The notice required to be given to the employer may be served by any person over sixteen years of age, who shall make return upon a copy of the notice, properly sworn to, showing the date of service where and upon whom served, but no special form of the return of [fol. 155] service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time.

Sec. 2477-m9. Compensation Schedule.—If any employe has not given notice to reject the terms, conditions and provisions of this act, or has given such notice and waived the same as by this act provided, and the employer has not rejected the terms, conditions and provisions of the act or has given such notice and waived the same and the employer receives a personal injury arising out of and in the course of the employment, compensation shall be paid as herein provided.

(a) The compensation provided for in this act shall be paid in accordance with the schedule unless otherwise provided.

(b) At the time of the injury and thereafter during the disability, but not exceeding four weeks of incapacity, the employer, if so requested by the employe, or any one for him, or if so ordered by the court or Iowa Industrial Commissioner shall furnish reasonable surgical, medical and hospital services, and supplies therefor, not exceeding one hundred ($100.00) dollars. Provided, however, that in exceptional cases, an application may be made in writing to the Iowa Industrial Commissioner for additional surgical, medical and hospital services, and supplies therefor, in which case a copy of such application shall be mailed to the employer or his insurer. If such application is approved by the commissioner, then the employer shall [fol. 156] furnish such additional services and supplies for such period, and in such amount as the Iowa Industrial Commissioner shall order, but in no event to exceed one hundred ($100.00) dollars.

(c) Where the injury causes death the compensation under this act shall be as follows:

The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

(d) If death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to sixty per cent of his average weekly wages, but not more than fifteen ($15.00) dollars nor less than six ($6.00) dollars per week for a period of three hundred weeks.

(e) If the employe leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependents bears to the annual earnings of the deceased at the time of the injury. When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

(f) Where injury causes death to an employe, a minor, whose [fol. 157] earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d) section ten (nine).

(g) No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; provided, however, that this provision shall not apply to those injuries resulting in disability partial in character and permanent in quality and compensated according to the schedule found in section twenty-four hundred seventy-seven-m-9 (j) (2477-m-9-j), Supplement to the Code, 1913. Should such incapacity extend beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury; provided, however, that if the period of incapacity extends beyond the thirty-fifth day following the date of the injury, then the compensation for the fifth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (⅔) of the weekly compensation; if the period of incapacity extends beyond the forty-second (42) day following the date of the injury, then the compensation for the sixth week of incapacity shall be increased by adding thereto an amount equal to two-thirds (⅔) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation for the seventh week of incapacity shall be increased by adding thereto an amount equal to two-thirds (⅔) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the [fol. 158] compensation thereafter shall be only the weekly compensation provided for in this law.

(h) For injury producing temporary disability, sixty per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that if at the time of injury the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(i) For disability total in character and permanent in quality, sixty per cent of the average weekly wages received at the time of

the injury, subject to a maximum compensation of fifteen dollars per week, and a minimum of six dollars per week, provided that if at the time of injury, the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(j) For disability partial in character and permanent in quality, the compensation shall be as follows:

For all cases included in the following schedule, compensation shall be paid as follows, to-wit:

(1) For the loss of a thumb, sixty per cent of daily wages during forty weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty per cent of daily wages during thirty weeks.

[fol. 159] (3) For the loss of a second finger, sixty per cent of daily wages during twenty-five weeks.

(4) For the loss of a third finger, sixty per cent of daily wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty per cent of daily wages for fifteen weeks.

(6) For the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts above specified.

(7) The loss or more than one phalange shall be considered as the loss of the entire finger or thumb; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty per cent of daily wages during twenty-five weeks.

(9) For the loss of one of the toes other than the great toe, sixty per cent of daily wages during fifteen weeks.

(10) For the loss of the first phalange of any toe, shall be considered to be equal to the loss of one-half of such toe and the compensation shall be one-half of the amount above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty per cent of daily wages during one hundred fifty weeks.

(13) The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall constitute the loss of an [fol. 160] arm, and the compensation therefore shall be sixty (60

per cent) of the average weekly wages during two hundred twenty-five (225) weeks.

(14) For the loss of a foot, sixty per cent of daily wages during one hundred twenty-five weeks.

(15) The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall constitute the loss of a leg, and the compensation therefor shall be sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(16) For the loss of an eye, sixty per cent of daily wages during one hundred weeks.

(a) For the loss of a second or last eye, the other eye having been lost prior to the injury resulting in the loss of the second eye, sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(17) For the loss of hearing in one ear, sixty (60) per cent of daily wages during fifty (50) weeks, and for the loss of hearing in both ears, sixty (60) per cent of the daily wages during one hundred fifty (150) weeks.

(18) The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof caused by a single accident, shall constitute total and permanent disability, to be compensated according to the provisions of section twenty-four hundred seventy-seven-m-9 (i) (2477-m-9-i), supplement to the code, 1913.

(19) In all other cases in this clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the [fol. 161] schedule. Should the employe and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement.

(20) The amounts specified in this, clause (j) and subdivisions thereof, shall be subject to the same limitations as to maximum and minimum weekly payments as are stated in clause (h), section ten (nine) hereof.

Sec. 2477-m10. Death—Payment of Unpaid Balance.—Where an employe is entitled to compensation under this act for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

Sec. 2477-m11. Examination of Injured Employe—Suspension of Compensation.—After an injury, the employe, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably

requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employe; but if the employe request, he shall, at his own cost, be entitled to have a physician or physicians of his own selection to participate in such examination. The refusal of the employe to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension.

[fol. 162] Sec. 2477-m12. Contributions from Employes—No Reduction of Employer's Responsibility.—The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not be in any wise reducted by contribution from employes.

Sec. 2477-m13. Trustees for Minors and Those Mentally Incapacitated—Reports.—When an injured minor, employe or a minor dependent or one physically or mentally incapacitated from earning is entitled to compensation under this act, payment shall be made to a trustee appointed by the judge of the district court for each county in the respective judicial districts, and the money coming into the hands of the said trustees shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. The trustee shall make annual reports to the court of all money or property received and expended for each person, and for services rendered as trustee shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. If the judge making the appointment deems it advisable, a trustee may be appointed to serve for more than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or [fol. 163] diminished from time to time as the court may deem best. In case a deceased employe for whose injury or death compensation is payable leaves surviving him an alien dependent or dependents residing outside the United States, the consul-general, consul, vice-consul or consular agent of the nation of which the said dependent or dependents are citizens shall be regarded as the exclusive representative of such dependent or dependents. Such consular officer, or his duly appointed representative residing in the State of Iowa, shall have the exclusive right in behalf of such non-resident dependent or dependents to present, prosecute, litigate, adjust and settle all claims for compensation provided by this act, and to receive for distribution to such dependent or dependents all compensation arising thereunder.

Such consular officer or his duly appointed representative shall file with the industrial commissioner a copy of his exequatur or evidence of his authority and the industrial commissioner shall notify such

consular officer or his said representative of the death of all employes leaving alien dependent or dependents residing in the country of said consular officer so far as the same shall come to his knowledge, provided, however, that nothing herein shall abridge the right of any relative of such decedent who may reside in the State of Iowa to take out administration upon the estate of such decedent, and as such receive the funds due said estate; and provided further that before said consular agent or his representative shall have the right to receive funds due the estate of said decedent he shall regularly take out administration in the county where decedent last resided, [fol. 164] and give bond as administrator for the protection of such funds as provided by law.

Sec. 2477-m14. Commutation of Future Payments—Discretion of Court.—In any case where the period of compensation can be determined definitely either party may, upon due notice to the other, apply to any judge of the district court for the county in which the accident occurred for an order commuting further payments to a lump sum; provided, however, that no judge of the district court shall consider any such application until there is endorsed thereon by the Iowa Industrial Commission his approval of such commutation, and no order shall be issued by such judge contrary to the endorsement of said Industrial Commissioner. And such judge may make such an order when it shall be shown to his satisfaction that the payment of a lump sum in lieu of future monthly or weekly payments, as the case may be, will be for the best interest of the person or persons receiving or dependent upon said compensation, or that the continuance of periodical payments will, as compared with lump sum payments, entail undue expense or undue hardship upon the employer liable therefor. Where the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five per cent per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, for which said compensation was being paid, and be entitled to a duly executed release, upon filing [fol. 165] which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record.

Sec. 2477-m15. Schedule of Computation.—The basis for computing compensation provided for in this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employe was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonble, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In case of injured employes who earn either no wages or [fol. 166] less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that class is not obtainable, then of the class or kindred or similarity in the same general employment in the same neighborhood.

(f) As to employes employed in a business or enterprise which customarily shuts down and ceases operation during a season of each year, the number of working days which it is the custom of such business or enterprise to operate each year shall be used instead of three hundred as a basis for computing the annual earnings provided the minimum number of days which shall be used as a basis for the year's work shall not be less than two hundred.

(g) Earnings, for the purpose of this action, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employe to cover any special expense entailed on him by the nature of the employment.

(h) In computing the compensation to be paid to any employe who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

[fol. 167] Sec. 2477-m16. Terms Defined.—In this act unless the context otherwise requires:

(a) "Employer" includes and applies to any person, firm, association or corporation, and includes state, counties municipal corporations, cities under special charter and under commission form of government and shall include school districts and the legal repre-

sentatives of a deceased employer. Whenever necessary to give effect to section seven of this act it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously with "employe," and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual or not for the purpose of the employer's trade or business or those engaged in clerical work only, but clerical work shall not include one who may be subjected to the hazards of the business, or one holding an official position or standing in a representative capacity of the employer, or official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter or commission form of government, shall not be considered an employe thereof.

The term "workman" shall include the singular and plural of both sexes. Any reference to a workman who has been injured [fol. 168] shall, where the workman is dead, include a reference to his dependents as herein defined, legal representatives or where the workman is a minor or incompetent to his guardian or next friend.

(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employe:

(1) The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury, and should the deceased employe leave no dependent children, and should the surviving spouse remarry, then all compensation payable to her shall terminate on the date of such remarriage.

(2) A child or children under sixteen years of age (and over said age if physically or mentally incapacitated from earning) whether actually dependent for support or not upon the parent at the time of his or her death.

(3) A parent of a minor entitled to the earnings of the employe at the time when the injury occurred, subject to provisions of subdivision (f), section ten (nine) hereof.

(4) If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or

[fol. 169] persons wholly dependent, then payment shall be made to partial dependents.

(5) In all other cases, questions of dependency in whole or in part shall be determined in accordance with the fact as the fact may be at the time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them, and persons partially dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent the death benefit shall be divided among them according to the relative extent of their dependency. Provided, however, that when a lump sum is paid as contemplated by this act, the court or commissioner, in making distribution thereof, shall take into consideration the contingent rights of partial beneficiaries or the rights of those who may become such after a wholly dependent child or children become sixteen years of age.

(6) Step-parents shall be regarded in this act as parents.

(7) Adopted child or children or step-child or children shall be regarded in this act the same as if issue of the body.

(d) "Injury" or "personal injury" includes death resulting from injury.

(e) The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to [fol. 170] those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

(f) The words "injury" and "personal injury" shall not include injury caused by the wilful act of a third person direct against an employe for reasons personal to such employe or because of his employment.

(g) They shall not include a disease except as it shall result from the injury.

(h) The word "court" whenever used in this act unless the context shows otherwise, shall be taken to mean the district court.

Sec. 2477-m17. Insurance Against Compensation Prohibited—Penalty—(a) Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void; and any employer withholding from the wages of any employe any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense, in the discretion of the court.

No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies.

Sec. 2477-m18. Contract Respecting Claim for Injury Deemed Fraudulent.—Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary [fol. 171] of any claim under the provisions of this act within twelve days after the injury shall be presumed to be fraudulent.

Sec. 2477-m20. Attorney's Lien—Subject to Approval.—No claim of an attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record or the Iowa Industrial Commissioner, which approval may be made in term time or vacation.

Sec. 2477-m21. Applicable to Intrastate and Interstate Commerce.—The provisions of this act shall apply to employers and employes as defined in this act engaged in intra-state commerce and also those engaged in inter-state or foreign commerce for whom a rule or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intra-state work or foreign commerce shall be clearly separable and distinguishable from inter-state or foreign commerce; provided, that any such employer and workman of such employer working only in this state may, subject to the approval of the Iowa Industrial Commissioner, and so far as not forbidden by any act of Congress or permitted, voluntarily by written agreement, accept and become bound by the provisions of this act in like manner and with the same force and effect in every respect as by this act provided for other employers and employes.

[fol. 172] Part II

Sec. 2477-m22. Iowa Industrial Commissioner—Appointment—Term.—There is hereby created the office of Iowa industrial commissioner, to be appointed by the governor, by and with the consent of the senate. The term of office of the commissioner shall be six years. An appointment may be made to fill a vacancy or otherwise when the senate is not in session, but shall be acted upon at the next session thereof.

The Iowa industrial commissioner shall appoint a deputy, for whose acts he shall be held responsible, who shall hold office during the pleasure of said industrial commissioner. Such appointment shall be made in writing, and must be approved by the executive council of the State of Iowa. The deputy, in the absence or disability of the Iowa industrial commissioner, shall have all the powers and perform all of the duties of the industrial commissioner pertaining to his office, and shall receive an annual salary of twenty-four hundred dollars, payable in equal monthly installments out of the state

treasury and in the same manner as are the salaries of other state officials.

Sec. 2477-m23. Salary—Expenses—Office—Seal—Assistants—Accounts—Political Activity—Annual Appropriation.—The salary and actual necessary expenses of the commissioner shall be paid by the state, and he shall be provided with adequate and necessary office rooms, furniture, equipment, supplies and other necessaries in the transaction of the business. The annual salary of the commissioner shall be thirty-three hundred dollars. The commissioner, by and [fol. 173] with the consent of the executive council, may fix the salary and appoint a secretary and other assistants and clerical help as may be required and needed, provided, that the salarly of the secretary shall not exceed eighteen hundred dollars per annum. The salary and actual personal expense account of the commissioner shall be itemized and sworn to and filed as other current bills as provided by statute, and warrant therefor shall be issued by the auditor upon the treasurer of the state for the payment thereof at the end of each calendar month; provided, however, that the expense account may be audited, allowed and paid at the end of each week. The commissioner shall provide himself with a seal, which shall be used to authenticate his orders, decisions and other proceedings deemed necessary, upon which shall be inscribed the words "Iowa Industrial Commissioner's Seal" and the date of organization. All other accounts made by, through or under the commissioner for salaries (and) expenditures, unless otherwise by this act provided, shall be itemized and sworn to by the parties entitled thereto, audited by the commissioner, attested by the secretary, filed as other bills are required by statute, and a warrant shall issue therefor by the auditor of state upon the treasurer, who shall pay the same out of the funds appropriated for the use of the commissioner as by this act provided. The salaries of all persons under the commissioner shall be audited, allowed and paid at the end of each month, and expense accounts may be audited, allowed and paid at the end of each week. The commissioner shall have the power to remove the secretary or any [fol. 174] other person appointed to an office by him at any time the commissioner may see fit.

It shall be unlawful for any appointee by the commissioner to espouse the election or appointment of any candidate for or to any political office, or contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person performing the duties as an appointee under the commissioner violating the provisions of this act shall be sufficient cause for dismissal and removal from office.

Before entering upon his duties the commissioner shall qualify by taking the oath of his office, that he will support the constitution of the United States and of the State of Iowa, and will faithfully and impartially, without fraud, fear or favor, discharge the duties of his office incumbent upon him, as provided by the law of the state of Iowa, to the best of his ability and understanding.

There is hereby appropriated out of any money not otherwise appropriated for the use of the commissioner, as contemplated within the terms of this act or acts amendatory thereof, or other statutes relating to the commissioner, his duties and responsibilities empowered by law, the sum of twenty thousand dollars annually, and in addition thereto the executive council shall provide and furnish the commissioner with such printing as may be necessary in the transaction of the business within the contemplation of the law.

Sec. 2477-m24. Powers—Rules—Witnesses—Reports.—The commissioner may make rules and regulations not inconsistent with this [fol. 175] act for carrying out the provisions of the act. The employer shall furnish upon request of an injured employe or dependent or any legal representative acting for such person, a statement of the earnings, wages, or salary and other matters relating to such earnings, wages, or salary during the year or part of the year that such employe was in the employment of such employer for the year preceding the injury. Provided, however, that not more than one report shall be required for each on account of any one injury. Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of precedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties. The commissioner shall have the power to subpœna witnesses, administer oaths and to examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem; in both cases five cents per mile for traveling to and from the place of hearing. The district court is hereby empowered to enforce by proper proceedings the provisions of this section relating to the at- [fol. 176] tendance and testimony of witnesses and the examination of books and records. The deposition of any witnesses may be taken and used as evidence in any hearing pending before a board of arbitration in workmen's compensation proceeding in connection herewith. That such deposition shall be taken in the same manner as provided for the taking of depositions in the district court, and when so taken shall be admissable in evidence in such hearings in the same manner subject to the same rules governing the admission of evidence in the district court. Application for permission to take depositions in such case shall be filed in the district court of the county wherein the case for arbitration shall be heard. The commissioner shall make biennial reports to the governor who shall transmit the same to the general assembly, in which, among other

things, the commissioner shall recommend such changes in the law covered by this act as he may deem necessary.

Sec. 2477-m25. Compensation Agreements—Approval.—If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the Iowa industrial commissioner by the employer or employe, and unless the commissioner shall, within tweny days, notify the employer and employe of his disapproval of the agreement by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this act. In case the injured [fol. 177] employe is a minor, either he or the trustee provided for in section twenty-four hundred seventy-seven-m-13 (2477-m-13), supplement to the code, 1913, may execute the memorandum of agreement provided for herein, and may give a valid and binding release for the compensation paid on his account under the terms of this act. Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this act.

Sec. 2477-m26. Committee of Arbitration.—If the employer and the injured employe or representatives or dependents fail to reach an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration. The arbitration committee shall consist of three persons, one of whom shall be the industrial commissioner who shall act as chairman. The other two shall be named, respectively, by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

Sec. 2477-m27. Oath of Arbitrators.—The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

I, —— ——, do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partially toward either party.

(Signed) —— ——.

Sec. 2477-m28. Appointment of Arbitrators.—It shall be the duty of the industrial commissioner, upon notification that the parties have failed to reach an agreement, to request both parties to appoint [fol. 178] their respective representatives on the committee of arbitration. The commissioner shall act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, or after a vacancy has occurred, the commissioner shall fill the vacancy and notify the parties to that effect.

Sec. 2477-m29. Powers of Committee—Hearings—Decisions.—The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be in the city, town or place where the injury occurred, if

within the state. If the injury occurred outside this state the hearings of the committee shall be held in the county seat of this state which is nearest to the place where the injury occurred unless the interested parties and the Iowa Industrial Commissioner mutually agree by written stipulation that the same may be held at some other place. The decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Commissioner. Unless a claim for review is filed by either party within five days from the date of filing the decision with said Commissioner, such decision shall be enforceable under the provisions of this chapter.

Sec. 2477-m30. Examination by Physician—Fee—Evidence.—The industrial commissioner may appoint a duly qualified impartial physician to examine the injured employe and make report. The fee for this service shall be five dollars, to be paid by the industrial [fol. 179] commissioner, together with traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employe shall not be prohibited from testifying before the Iowa industrial commissioner or any other person, commission or court, as to the results of his examination or the condition of the injured employe.

Sec. 2477-m31. Compensation of Arbitrators—Costs.—The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer who may deduct an amount equal to one-half of the sum from any compensation found due the employe. And all other costs incurred in the hearing before the board of arbitration shall be taxed to the losing party, or an equitable apportionment made thereof by the committee according to the facts.

Sec. 2477-m32. Review—Second Hearing.—If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter or right be entitled to a second hearing upon any question of fact.

Sec. 2477-m33. Any party in interest may present a certified copy [fol. 180] of an order or decision of the commissioner, or an award of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the industrial commissioner, shall have

the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision.

No order or award of an arbitration committee is appealable direct to the courts, but if any party in interest is aggrieved thereby, he may within five (5) days from the date thereof apply to the industrial commissioner for a review of the same by such industrial commissioner in the manner as hereinbefore provided. If any such party is aggrieved by reason of an order or decree of the Iowa industrial commissioner, such party may appeal therefrom to the district court of Iowa, only in the manner and upon the grounds following:

Within thirty (30) days from the date of such order or decree of the industrial commissioner, the party aggrieved may file an application in writing with the Iowa industrial commissioner asking for [fol. 181] an appeal from such order or decree, stating generally the grounds upon which such appeal is sought. In the event such application is filed as hereinbefore provided, the industrial commissioner shall, within thirty days from the filing of same, cause certified copies of all documents and papers then on file in his office in the matter, and a transcript of all testimony taken therein, to be transmitted with his findings and order or decree to the clerk of the district court of Iowa in and for that county wherein the injury occurred. The application for such appeal may thereupon be brought on for hearing before said district court upon such record by either party on ten (10) days' written notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling of another judge. The findings of fact made by the industrial commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order or decree of the industrial commissioner, if he finds:

(1) That the industrial commissioner acted without or in excess of his powers; or

(2) That the order or decree was procured by fraud; or

(3) That the facts found by the industrial commissioner do not support the order or decree.

(4) That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

No order or decree of the industrial commissioner shall be set [fol. 182] aside by the court upon other than the grounds just stated.

Upon the setting aside of any such order or decree, the court may recommit the controversy to the industrial commissioner for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. An abstract of the judgment entered by the trial court upon the appeal from any order or decree shall be made by the clerk thereof upon the docket entry of any judgment which may hereinbefore have been rendered upon it. Such order or decree and transcript of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties within the state.

Any party in interest who is aggrieved by a judgment entered by the district court upon the appeal of an order or decree, may appeal thereform within the time and in the manner provided for in appeal from the orders, judgments and decrees of the district court of Iowa; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar.

No fee shall be charged by the clerk of any district court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceeding on appeal from an order or decree, costs as between the parties shall be allowed or not in the discretion of the court.

[fol. 183] Sec. 2477-m34. Review of Payment—Notice.—(a) Any payment required to be made under this act, which has not been commuted, may be reviewed by the industrial commissioner at the request of the employer or of the employe, and if on such review the commissioner finds the condition of the employe warrants such action, he may end, diminish or increase the compensation, subject to the maximum or minimum amounts provided for in this act. All hearings upon review of the Iowa Industrial commissioner under the provisions of this section, or under section twenty-four hundred seventy-seven-m-32 (2477-m-32), supplement to the code, 1913, shall be held at Des Moines, Iowa, unless the interested parties and the Iowa industrial commissioner mutually agree by written stipulation that the same may be held at some other place.

Upon the presentation to the court of a certified copy of a decision of the industrial commissioner ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify any judgment or decree then on record in his court to conform to such decision.

(b) Any notice to be given by the commissioner or court provided for in this act shall be in writing but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties.

Sec. 2477-m35. Fees Subject to Approval.—Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial commissioner unless otherwise provided in this act.

[fol. 184] Sec. 2477-m36. Reports by Employers—Records—Inspection.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment and resulting in incapacity for a longer period than one day. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury causing incapacity for a longer period than one day, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose.

Upon the termination of the disability of the injured employe, or if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

All books, records and pay rolls of the employers, coming under this act showing or reflecting in any way upon the amount of wage expenditure of such employer, shall always be open for inspection by the industrial commissioner, or any of his representatives pre-[fol. 185] senting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure; the number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in his administration of the law. But information obtained within the contemplation of this act shall be used for no other purpose than the information of the commissioner or insurance association with reference to the duties imposed upon such commissioner. A refusal on the part of the employer to submit his books, records or pay rolls for the inspection of the commissioner, or his authorized representatives presenting written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state treasury.

Sec. 2477-m37. Political Activity and Contributions Prohibited—Penalty.—It shall be unlawful for the commissioner, during his term of office, to serve upon any committee of any political party or espouse the election or appointment of any person for any political office or contribute to any campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointed to any political office. A violation of this section

shall be deemed a misdemeanor and upon conviction shall be fined one hundred dollars.

Sec. 2477-m38. Candidate for Commissioner—Political Promises Prohibited—Penalty.—It shall be unlawful for any person who is a candidate for the appointment as commissioner to make any [fol. 186] promise to another, expressed or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as commissioner, vote to appoint such person or one whom he may recommend to an office within the power of the commissioner to appoint. A violation thereof shall be deemed a misdemeanor and upon conviction thereof shall be fined one hundred dollars.

Sec. 2477-m39. Recommendations of Candidates to be in Writing—Record—Public Inspection—Financial Interest Prohibited—Penalty.—All recommendations made by any person to the commissioner asking the appointment of another as commissioner shall be reduced to writing signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same and filed by the commissioner and open for public inspection at all reasonable times and hours. If any person recommending the appointment of another within the contemplation of this act refuse to reduce the same to writing, it shall be the duty of the person to whom the recommendation is made, to make a brief memorandum thereof, stating the name of the person recommended and the name of the person who made the same, which shall be filed as by this act in other cases provided. It shall be unlawful for the commissioner to be financially interested in any business enterprise coming [fol. 187] under or affected by this act during his term of office, and if he offend this statute, it shall be sufficient grounds for his removal from office and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy.

Sec. 2477-m40. Removal from Office—Filing of Charges—Executive Council Shall Hear.—The governor shall remove from office the commissioner on the grounds of inefficiency, neglect of duty, or malfeasance in office, upon written charges having been filed with the executive council and sustained by proofs; but written notice of such charges, together with a copy thereof, shall be served upon the accused ten days before the time fixed for hearing. The executive council shall have jurisdiction to hear the case, and shall make such finding in accordance with justice and the law. The finding shall be reduced to writing, and report and finding filed with the governor.

Part III

Sec. 2477-m41. Insurance of Liability.—Every employer, subject to the provisions of this act, shall insure his liability thereunder in

some corporation, associtaion or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ [fol. 188] under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensations provisions of chapter eight-a (8-a), title XII, supplement to the code, 1913.

Any employer who fails to insure his liability as required herein shall post and keep posted a sign of sufficient size and so placed as to be easily seen by his employes in the immediate vicinity where working, which sign shall read as follows:

Notice to Employes

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that he cause of such failure he is liable to his employes in damages for personal injuries sustained by his employes in the same manner and to the same extent as though he had legally exercised his right to reject the compensation provisions of chapter eight-a (8-a), title XII, supplement to the code, 1913.

(Signed) —— ——.

Any employer coming under the provisions of this act who fails to comply with this section or to post and keep posted the above notice in the manner and form herein required shall be guilty of a misdemeanor.

Sec. 2477-m42. Mutual Companies—Conditions.—For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, [fol. 189] may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of preminus due, shall be evidence of compliance with the preceding section.

Sec 2477-m43. Benefit Insurance—Approval.—Subject to the approval of the Iowa Industrial Commissioner, any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act; but such scheme shall in no instance provide less than the benefits here secured, nor vary the period of compensation provided for disability or for death, or the provisions of this act with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; provided, further that the approval of the Iowa industrial

commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits in addition to those required by this act commensurate with such contributions.

Sec. 2477-m44. Certificate of Approval.—Whenever such scheme or plan is approved by the Iowa Industrial Commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions of this act during a period of time fixed by said department.

[fol. 190] Sec. 2477-m45. Termination—Appeal to District Court.—Such scheme or plan may be terminated by the Iowa Industrial Commissioner on reasonable notice to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this act, but from any such order of said Iowa Industrial Commissioner the parties affected, whether employer or workman, may upon the giving of proper bond to protect the interests involved, appeal for equitable relief to the district court of this state.

Sec. 2477-m46. Maximum Commission or Compensation for Reinsurance.—No insurer of any obligation under this act shall either by himself or through another, either directly or indirectly, charge or accept as a commission or compensation for placing or renewing any insurance under this act more than fifteen per cent of the premium charged.

Sec. 2477-m47. Policy Requirements.—Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jerisdiction of the insured for the purpose of this act shall be juridiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured.

[fol. 191] Sec. 2477-m48. Insolvency Clause Prohibited—Lien of Insured.—No policy of insurance issued under this act shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is due and unpaid. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability or disability of the insured to receive the amount due and pay it over to the insured workman, or his dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent

of discharging any obligation of the insured to said workman or his dependents.

Sec. 2477-m49. Proof of Solvency—Revocation of Approval.—Where an employer coming under this act furnishes proofs to the insurance department satisfactory to the insurance department and Iowa Industrial Commissioner, of such employer's solvency and financial ability to pay the compensation and benefits as by this act provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such insurance department security satisfactory to such insurance department and the Iowa Industrial Commissioner as will secure the payment of such compensation such employer shall be relieved of the provisions of section forty-two of this act; provided that such employer shall from [fol. 192] time to time, as may be required by such insurance department and Iowa Industrial Commissioner, furnish such additional proof of solvency and financial ability to pay as by this section of this act provided.

The insurance department and Iowa Industrial Commissioner may at any time, upon reasonable notice to such employer and upon hearing, revoke for cause any order or approval theretofore made, as by this act provided and within the contemplation of this section.

Defendant's Exhibit H

Elder vs. C., R. I. & P. 3-3-24

BEFORE THE IOWA INDUSTRIAL COMMISSIONER OF IOWA

THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, Employer, Applicant,

vs.

FRED ELDER, Employer, Respondent

COMMISSIONER'S CERTIFICATE

To whom it may concern:

I, A. B. Funk, hereby certify that I am the duly appointed and qualified Industrial Commissioner of Iowa.

That I am the legal custodian of the official records in the State [fol. 193] of Iowa pertaining to the provisions of the Workmen's Compensation Law of said state.

I further certify:

That Exhibit 1, attached hereto, is a true and correct copy of the Application for Arbitration which was filed in my office in connection with the above entitled case on January 5, 1924.

That Exhibit 2, attached hereto, is a true and correct copy of Respondent's Answer which was filed in my office in connection with the above entitled case on January 11, 1924.

That Exhibit 3, attached hereto, is a true and correct copy of Respondent's Plea in Abatement which was filed in my office in connection with the above entitled case on January 11, 1924.

That Exhibit 4, attached hereto, is a true and correct copy of Respondent's Motion for Continuance which was filed in my office in connection with the above entitled case on January 26, 1924.

That Exhibit 5, attached hereto, is a true and correct copy of the Ruling on the Motion for Continuance in connection with the above entitled case which was made and filed by the Iowa Industrial Commissioner on January 26, 1924.

That Exhibit 6, attached hereto, is a true and correct copy of the Ruling on Plea in Abatement and Motion for Continuance which was made and filed by the Iowa Industrial Commissioner on February 4, 1924.

That Exhibit 7, attached hereto, is a true and correct copy of a stipulation entered into by the parties of the above entitled case and filed in the office of the Iowa Industrial Commissioner to the effect that the Arbitration Hearing would be had at Des Moines, Iowa instead of at Chariton, Iowa.

[fol. 194] That Exhibit 8, attached hereto, is a true and correct copy of Applicant's Designation of Arbitrator which was filed in my office in connection with the above entitled case on February 9, 1924.

That Exhibit 9, attached hereto, is a true and correct copy of Stipulation for Submission Without Arbitrators which was filed in my office in connection with the above entitled case on February 11, 1924.

That Exhibit 10, attached hereto, is a true and correct copy of a stipulation entered into by the parties in connection with the above entitled case and filed in my office having to do with the ownership of certain railway cars referred to in the evidence submitted by this applicant.

That Exhibit 11, attached hereto, is a true and correct copy of the Arbitration Decision made by Deputy Iowa Industrial Commissioner, Ralph Young, and filed in my office in connection with the above entitled case on February 13, 1924.

That Exhibit 12, attached hereto, is a true and correct copy of Respondent's Application for Review which was filed in my office in connection with the above entitled case on February 16, 1924.

That Exhibit 13, attached hereto, is a true and correct copy of a letter written and mailed to Attorneys Davis and Michel, scheduling the Review Hearing in the above entitled case to be had in the office of the Iowa Industrial Commissioner on February 26, 1924, at 10:00 a. m.

That Exhibit 14, attached hereto, is a true and correct copy of a letter written and mailed to the Claim Department of the Chicago, Rock Island and Pacific Railway Company, scheduling the Review Hearing in the above entitled case to be had in the office [fol. 195] of the Iowa Industrial Commissioner on February 26, 1924, at 10:00 a. m.

That Exhibit 15, attached hereto, is a true and correct copy of

a letter written and mailed to Lehman, Seevers and Hurlburt, Attorneys, scheduling the Review Hearing in the above entitled case to be had in the office of the Iowa Industrial Commissioner on February 26, 1924, at 10:00 a. m.

That the foregoing mentioned exhibits, together form a full and complete copy of the record in the above entitled case as it now appears in the files of the Iowa Industrial Commissioner.

Signed at Des Moines, Iowa, this 23rd day of February, 1924, under the official seal of my office.

A. B. Funk, Iowa Industrial Commissioner. (Seal.)

[fol. 196] EXHIBIT NO. 1 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER OF THE STATE OF IOWA

[Title omitted]

Application for Arbitration

Comes now the Chicago, Rock Island & Pacific Railway Company and makes application for the arbitration of a controversy with the respondent Fred Elder, and for grounds of this application shows the court:

The Chicago, Rock Island & Pacific Railway Company is a corporation organized under the laws of the States of Iowa and Illinois, and engaged in the business of operating a line of railroad through Iowa, Illinois and adjacent states:

The petitioner is engaged both in interstate and intrastate commerce, and is a common carrier of goods and passengers in the State of Iowa.

Fred Elder is a resident of Lucas County, State of Iowa, and has been for more than three years last past.

That a controversy relative to the payment of compensation under [fol. 197] the Iowa Workmen's Compensation Law has arisen between this applicant and the said Fred Elder which parties have been wholly unable to adjust between themselves. That said controversy arises out of the following facts and circumstances:

That on the 4th day of February, 1923, the said Fred Elder was employed by the petitioner as a brakeman upon a mine run train which was engaged in switching cars of coal from certain mines adjacent to the town of Williamson, Iowa, in Lucas County, and that the work of the said Fred Elder was not work connected with or forming a part of interstate commerce.

That while so employed and in the course of his employment, the said Fred Elder received injuries as the result of a collision be-

tween a passenger train and the train in the operation of which he was employed. That the petitioner is not fully informed or advised as to the exact extent of the injuries which have been sustained by the said Fred Elder, but alleges that the said Fred Elder was on account thereof disabled from performing the usual duties of his employment as a brakeman for a period of approximately four or five months, and that the said Fred Elder claims to be still disabled from performing his duties as a brakeman.

That the petitioner has at all times been ready, willing and able to make settlement with the said Fred Elder under the terms of the Iowa Compensation Law, and that the said respondent has refused and still refuses to accept payment thereof, and demands of the petitioner the sum of $50,000.00.

[fol. 198] Wherefore the petitioner prays that an arbitration committee be formed, that the extent of the injury of the said Fred Elder be determined and that the extent of liability of this petitioner be determined, and that the Aribtration Committee and the Industrial Commissioner enter an order that the petitioner shall pay compensation to the said Fred Elder in accordance with the terms and provisions of the Iowa Workmen's Compensation Law.

The Chicago, Rock Island & Pacific Railway Company, by J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.

State of Iowa,
County of Polk, ss:

I, A. B. Howland on oath do state that I am one of the attorneys for the State of Iowa for the Chicago, Rock Island & Pacific Railway Company; that an investigation of the accident in which Fred Elder was injured has been conducted by the said railway company, and that I am familiar with the investigation, and with the facts disclosed thereby and that the facts set forth in the above and foregoing application for arbitration are true.

(Signed) A. B. Howland.

Subscribed and sworn to before me by A. B. Howland this 4th day of January, 1924. (Signed) M. Helen Thompson, Notary Public in and for Polk County, Iowa.

[fol. 199] Exhibit No. 2 to Defendant's Exhibit "H"

Before the Iowa Industrial Commissioner

[Title omitted]

Answer

By way of answer to the application for arbitration herein, Fred Elder, employee and respondent, respectfully shows the following facts:

He denies each and every allegation of the application for arbitration except such as are herein specifically admitted.

He admits that the applicant, The Chicago, Rock Island & Pacific Railway Company is a railway corporation and common carrier, substantially as alleged in said application.

He admits that he was in the employ of said railway company on the 4th day of February, 1923 and that he received certain injuries in the course of his employment.

He alleges further that at the time of said accident the applicant was an interstate carrier and engaged in interstate commerce and that [fol. 200] he, the said respondent was employed by the applicant as its servant and employe and as such was working and engaged in interstate commerce.

That the rights of this respondent are governed and controlled by the provisions of the act of Congress generally known and designated as the Federal Employers' Liability Act.

He further specifically denies that any controversy relative to payment of compensation under the Iowa Workmen's Compensation Law has arisen and alleges that by reason of the fact that he was engaged in interstate commerce at the time of said accident, that the provisions of the Iowa Workman's Compensation Law are not applicable to said accident and this Honorable Commissioner has no jurisdiction of said accident and no jurisdiction, power or right to determine the right of this respondent on account of said accident or the injuries received therein.

He further alleges that on the 30th day of October, 1923, he commenced an action in District Court of Steele County, Minnesota, against said Railway Company to recover on account of the identical injuries sustained in the identical accident set out in the application for arbitration herein, said action being based on his rights under the Federal Employers' Liability Act.

That defendant railway company was duly served with notice and appeared and answered and in said answer denied that said railway company and this respondent were engaged in interstate commerce and specially pleaded the provisions of the Iowa Workmen's Compensation Law and acceptance thereof by both parties as fixing and [fol. 201] establishing their rights and obligations therein.

That the said District Court in and for the County of Steele and State of Minnesota is a court of plenary jurisdiction and has full jurisdiction of the parties and of the subject matter of the action and has power to hear and determine all of the issues in said cause and will hear and determine the question as to whether the provisions of the Iowa Workmen's Compensation Law are applicable in the premises, and that from the judgment entered in said cause both parties have a right to appeal to the Supreme Court of the State of Minnesota, and a further right to apply to the Supreme Court of the United States for a review of said cause, and the entire issue will be fully heard, considered and determined in said cause.

Said cause is now pending in said court and has been specially

assigned for trial for a special term of said court beginning February 24, 1924.

Wherefore your respondent prays that said application be dismissed and abated and in the alternative that all proceedings be continued until the action now pending in the District Court of Steele County, Minnesota, shall have been determined.

Davis & Michel, Lehmann, Seevers & Hurlburt, Attorneys for Respondent.

[fol. 202] EXHIBIT NO. 3 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Plea in Abatement

Comes now Fred Elder, employee and respondent in the above entitled proceedings and appearing by his attorneys for his plea in abatement of these proceedings, respectfully shows unto the Commissioner:

1st. That heretofore and in October 30, 1923, he commenced an action in the District Court of the County of Steele and State of Minnesota against the defendant to recover under the provisions of the Act of Congress, generally known and designated as the Federal Employers' Liability Act, to recover for the identical injuries sustained in the identical accident as those referred to in the Application for Arbitration presented in this proceedings to the commissioner, by serving the defendant within the State of Minnesota with summons and complaint as provided by the statutes of Minnesota.

[fol. 203] 2nd. That thereafter and on or about November 17, 1923, the defendant served the attorneys for the plaintiff in said cause with the answer of the defendant therein and by said service entered a general appearance under the provisions of the statutes of the State of Minnesota.

3rd. That thereafter and on or about November 19, 1923, the plaintiff in said cause served his reply to the said answer and his note of issue and caused the said cause to be docketed in said District Court for trial at the December term, 1923, of said court, and said cause was duly assigned for trial, but that by an order of the court the said cause was contained to a special term of said court to be convened and held in February, 1924, and by said order the said cause was specially assigned for trial at said special term.

4. That by its answer in said cause the defendant denies that the accident to the plaintiff was sustained while both the plaintiff and defendant were engaged in interstate commerce and specially pleads the provisions of the Iowa Workmen's Compensation Law are ap-

plicable in the premises, and that from the judgment entered in said cause both parties have a right of appeal to the Supreme Court of the State of Minnesota, and a further right to apply to the Supreme Court of the United States for a review of said cause, and the entire issue will be fully heard, considered and determined in said cause.

6th. That by reasons of the provisions of Section I of Article IV of the Constitution of the United States full faith and credit must be given to the judgment rendered in said cause by the courts of the [fol. 204] State of Iowa and said judgment will be binding and conclusive against the parties to the said action.

7th. That the application for arbitration presented by the Railway Company as employer is not presented in good faith and for the purpose of settling any disagreement between the employer and employe and growing out of a claim made by the employe under and by virtue of the provisions of the Iowa Workmen's Compensation Act, but is presented solely for the purpose of causing the employe such embarrassment as may be possible in the prosecution of the action pending between the parties in the District Court of Steele County and State of Minnesota.

8th. That said action now pending in the said District Court will be tried and determined before there could be a judicial determination thereof by any court of the State of Iowa, and that the arbitration proceedings are futile, useless and without any value to the parties and that to proceed therewith is merely to make unnecessary expense and waste of time.

9th. That if the arbitration is proceeded with and an award made and confirmed under the provisions of the Iowa Workmen's Compensation Law, the plaintiff in the action in the said District Court would be put to trouble and expense in that it might be necessary to apply to the court for equitable relief and for an injunction against the said Railway Company to prevent the filing of the confirmation and award or taking judgment in the courts of the State of Iowa.

Wherefore, the respondent prays that the proceedings abate and [fol. 205] that the application be denied, and, alternatively, in the event that the commissioner shall not sustain his said plea, then he prays that all proceedings be continued pending the determination of the cause now pending between the parties in the District Court of Steele County, Minnesota.

The respondent further prays that the commissioner will note and make of record in said proceedings, in the event that the plea in abatement be overruled and a continuance denied his protest any proceedings and his refusal to participate in the arbitration.

Davis & Michel, R. M. Haines, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota; Lehmann, Seevers & Hurlburt, Flynn Bldg., Des Moines, Iowa, Attorneys for the Respondent.

[fol. 206] STATE OF MINNESOTA,
County of Hennepin, ss:

I, R. M. Haines, being first duly sworn on oath state that I am an attorney at law duly admitted to practice in the State of Iowa and Minnesota, and that for six months last past I have been engaged in the practice in association with Tom Davis and Ernest A. Michel under the firm name and style of Davis & Michel, with offices at 419 Metropolitan Bank Building, Minneapolis, Minnesota; that as such an associate of said firm I personally prepared the complaint and summons in the cause of Fred Elder, plaintiff vs. Chicago, Rock Island & Pacific Railway Company, defendant, for the District Court of the County of Steele and State of Minnesota and caused the same to be served; that I have had supervisions of the said action and know personally of the facts in connection therewith and that the files and records are now in my possession; that at the request of the said Fred Elder I now make this affidavit for the reason that I have such personal knowledge of the facts; that I have prepared the foregoing plea in abatement at the request of the said Fred Elder and have full authority to appear as his attorney in this proceeding; that I know the contents of the foregoing plea in abatement and that the statements therein contained are true as I verily believe.

R. M. Haines.

Sworn to before me and subscribed in the county and state aforesaid this January 9, 1924. A. C. Hartley. (Seal.)

[fol. 207] EXHIBIT NO. 4 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Motion for Continuance

Comes now Fred Elder, and respectfully moves that the hearings on the plea in abatement and on the arbitration in chief be continued for a reasonable time on account of sickness of counsel, and in support thereof the Honorable Commissioner is respectfully referred to the affidavits hereto attached marked Exhibits "A", "B", and "C", respectfully.

Davis & Michel, Lehmann, Seevers & Hurlburt, Attorneys for Respondent.

[fol. 208] EXHIBIT "A" TO DEFENDANT'S EXHIBIT 4

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

STATE OF MINNESOTA,
County of Hennepin, ss:

Ernest A. Michel, being first duly sworn, deposes and says that he is a member of the firm of Davis & Michel; that R. M. Haines is an associate member of said firm.

Affiant further says that one of the members of said firm of Davis & Michel, Tom Davis, is at the present time in the City of Denver, Colorado, in attendance upon a term of the United States District Court being held in said city; that the above matter has been entirely handled and cared for by said R. M. Haines and that he alone is familiar therewith.

Affiant further says that said R. M. Haines is now confined to his home with illness and has been so confined to his home for more than one week last past.

Affiant further says that there is pending in the District Court of [fol. 209] Steele County, Minnesota, an action wherein Fred Elder is plaintiff, and Chicago, Rock Island & Pacific Railway Company is defendant; that said action is based on a law of Congress; that the term of court of said Steele County, Minnesota, and that said adjourned term convenes on the 25th day of February, 1924, and that in its order said case will be reached for trial within three or four days after said February 25th.

Affiant states that this affidavit is made for the purpose of securing a reasonable continuance of the hearing in the above entitled action so that the said R. M. Haines may be present to protest the rights of the said Fred Elder; that said Fred Elder has received serious and permanent injuries as a result of the negligence of said Chicago, Rock Island and Pacific Railway Company and that any amount that could be allowed to him by the Industrial Commission of Iowa under the Iowa statute would be wholly inadequate as compensation for his injuries.

Ernest A. Michel.

Subscribed and sworn to before me this 25th day of January, 1924. A. C. Hartley. (Seal.)

[fol. 210] EXHIBIT "B" TO DEFENDANT'S EXHIBIT 4

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

STATE OF MINNESOTA,
County of Hennepin, ss:

Arthur E. Allen, being first duly sworn, deposes and says that he is an osteopathic physician; that he has been practicing his profession as such for more than five years last past in the City of Minneapolis, Minnesota; that he is acquainted with R. M. Haines, an attorney at law of the firm of Davis & Michel and R. M. Haines of Minneapolis, Minnesota; that affiant is in attendance upon and caring for said R. M. Haines and that said Haines is now confined to his home in the Antlers Apartments in Minneapolis, Minnesota; with an attack of the grippe and laryngitis; that in the opinion of affiant it would not be safe for said R. M. Haines to leave his home at an earlier date than about the 6th or 7th of February; that it would be dangerous to the health of said Haines to leave his home and be in [fol. 211] Des Moines on the 28th day of January, 1924; that affiant is of the opinion that said Haines will be able to resume his duties during the week of February 4th, 1924.

Arthur E. Allen

Subscribed and sworn to before me this 25th day of January, 1924. A. C. Hartley. (Seal.)

EXHIBIT "C" TO DEFENDANT'S EXHIBIT 4

STATE OF IOWA,
Polk County, ss:

I, Marion B. Seevers, being first duly sworn, state that I am a member of the firm of Lehmann, Seevers & Hurlburt, attorneys located at Des Moines, Iowa; that my firm are local counsel for Fred Elder herein, and that I am the member of said firm who has had charge of this matter; that I have never seen Fred Elder, and am not familiar with either the law or the facts of this case. It has not been expected or desired by any one, either said Fred Elder, or Davis & Michel, or myself, that I take any leading part or assume any responsibility in connection with this matter.

(Signed) Marion B. Seevers.

Subscribed and sworn to before me this 26th day of January, 1924. (Signed) Mandel Elman, Notary Public. (Seal.)

[fol. 212] EXHIBIT No. 5 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Ruling Motion for Continuance

On January 5, 1924, the Chicago, Rock Island & Pacific Railway Company employer and applicant in the above entitled cause, Filed with the Iowa Industrial Commissioner an application for Arbitration of the cause under the Iowa Workmen's Compensation Law. Fred Elder, employe and respondent, was duly notified of the filing of such application and was furnished with copy of same.

On January 11, 1924, respondent filed with the Commissioner a Plea in abatement, alleging in such plea and assigning as reason for the same that a suit involving identical injuries sustained in the identical accident was pending in the district court of the County of Steele, and State of Minnesota, and that such suit had been pending in such court since October 30, 1923.

[fol. 213] On January 22, 1924, the Iowa Industrial Commissioner duly notified the parties that the hearing on respondent's Plea in Abatement would be had in the office of the Commissioner, at Des Moines, January 28, 1924.

On January 26, 1924, respondent filed with the Iowa Industrial Commissioner Motion for Continuance of the hearing on the Plea in Abatement, assigning as reason for such Motion the illness of counsel and counsel's inability on account of illness to be present at the hearing at the time scheduled.

Such motion for continuance as filed by respondent is hereby sustained and the hearing is continued to 9:00 A. M. February 4, 1924, when it is hereby definitely scheduled to be had.

The Commissioner desires that counsel take further notice that should either party in this cause fail to be present or represented at the hearing as scheduled February 4, 1924, such failure to appear by either party shall not be considered by the Commissioner as reason for further delay in ruling upon the plea, and ruling will be issued forthwith.

Dated at Des Moines, Iowa, this 26th day of January, 1924.

A. B. Funk, Iowa Industrial Commissioner. (Seal.)

[fol. 214] EXHIBIT No. 6 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Ruling on Plea in Abatement and Motion for Continuance

On January 11, 1924, Fred Elder, employe and respondent in the above entitled cause, filed Plea in Abatement, and alternatively Mo-

tion for a Continuance of the arbitration proceedings under the Iowa Workmen's Commission Act, petitioned for by the Chicago, Rock Island & Pacific Railway Company. Hearing on such Plea and Motion was had in the office of the department, February 4, 1924.

From the situation as outlined by counsel, the Commissioner is unable to elicit any reason for failure or refusal to assume and exercise jurisdiction of the subject matter involved. The injury in question was suffered in Iowa and proceeding under the Iowa Compensation Law is properly invoked to determine the question of liability under that statute. Wherefore, respondent's Plea in Abatement is overruled.

No acceptable reason is offered for delay in proceeding in this cause under the Iowa Workmen's Compensation Law. The petition [fol. 215] is properly before the Commissioner. The issues are defined and ready for determination in the manner prescribed by the statute. Wherefore, respondent's Motion for Continuance is denied and the arbitration hearing will be had at 10 A. M. February 11, 1924 as scheduled.

To all of which the respondent excepts.

Dated at Des Moines, Iowa, February 4, 1924.

A. B. Funk, Iowa Industrial Commissioner.

EXHIBIT NO. 7 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Stipulation

It is hereby stipulated by Fred A. Elder, by his attorneys, and the C. R. I. & P. Ry. Co., by its attorneys, that arbitration shall be had at Des Moines instead of at Chariton.

C., R. I. & P. Ry. Co., by R. L. Read, Its Attorneys. Fred Elder, by Lehmann, Seever & Hurlburt, His Attorneys.

[fol. 216] EXHIBIT No 8 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE INDUSTRIAL COMMISSIONER OF THE STATE OF IOWA

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Employer and Applicant,

vs.

FRED ELDER, Employee and Respondent

Applicant's Designation of Arbitrator

Comes now the applicant, The Chicago, Rock Island & Pacific Railway Company and designates and appoints W. H. McHenry of Des Moines, as its arbitrator upon the arbitration committee.

The Chicago, Rock Island & Pacific Railway Company, by J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.

[fol. 217] EXHIBIT No. 9 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE INDUSTRIAL COMMISSIONER OF THE STATE OF IOWA

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Employer and Appellant,

vs.

FRED ELDER, Employee and Respondent

Stipulation for Submission without Arbitrators

Now on this 11th day of February, 1924, it is hereby stipulated and agreed by and between the parties hereto, the employer by J. G. Gamble, R. L. Read and A. B. Howland, its attorneys, and the employe, by Davis & Michel and Lehmann, Seevers and Hurlburt, its attorneys, that the appointment of arbitrators by each party as provided in the Iowa Workmen's Compensation Law is hereby waived, and both parties do hereby consent that the Industrial Commissioner of the State of Iowa or the Deputy Industrial Commissioner shall hold said hearing and have the full power to make the same award as might have been made by an Arbitration Committee. And both parties do hereby waive the right to an arbitration [fol. 218] committee and agree that the decision of the Industrial Commissioner or his deputy shall be entered of record and have the same force and effect in all particulars as a decision of the arbitration committee, and neither party will thereafter raise any objection thereto.

Dated at Des Moines, Iowa, this 11th day of February, 1924.

The Chicago, Rock Island & Pacific Railway Company, by J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys. Fred Elder, Davis & Michel, Lehmann, Seevers & Hurlburt, His Attorneys.

[fol. 219] EXHIBIT No. 10 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Stipulation

It is hereby stipulated and agreed that the cars set out in applicant's exhibits under the initials, M, W, S, K, C, S, L. & N., and I, G, N, respectively belong to railway companies operating in other states, and that said Companies have no tracks or terminals in Iowa and operate no trains and no lines of railway in Iowa. This concession is made, subject to the objection by applicant that the same is irrelevant and immaterial.

J. G. Gamble, R. L. Read, A. B. Howland, Attorneys for Applicant. Davis & Michel, Lehman, Seevers & Hurlburt, Attorneys for Respondent.

[fol. 220] EXHIBIT No. 11 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Arbitration Decision

This case was submitted at Des Moines, Iowa, February 11, 1924, to the Deputy Industrial Commissioner, arbitrators being waived by stipulation of counsel.

Upon the record it is held:

1. That in wreck occurring February 4, 1923, Fred Elder, respondent herein, sustained injuries arising out of and in the course of his employment as a freight brakeman by the Chicago, Rock Island & Pacific Railway Company, applicant in this proceeding, such injuries causing the said Fred Elder to suffer disability.

2. That at the time of the injuries in question the average weekly wage of the said Fred Elder exceeded $25.00.

3. That at the time of the injury in question the said Fred Elder [fol. 221] was not engaged in interstate commerce so as to prohibit coverage of the case by the Iowa Workmen's Compensation Law.

4. That the case is subject to adjustment under the Iowa Workmen's Compensation Law.

Accordingly, The Chicago, Rock Island & Pacific Railway Company is hereby ordered to pay the Fred Elder under the Iowa Workmen's Compensation Law at the rate of $15.00 per week during the period of total disability resulting from the injury in question, pay-

ments starting as of the date of the injury. The Chicago, Rock Island & Pacific Railway Company is also ordered to pay the costs of this hearing.

Dated at Des Moines, Iowa, this 13th day of February, 1924.

(Signed) Ralph Young, Deputy Iowa Industrial Commissioner. (Seal.)

[fol. 222] EXHIBIT NO. 12 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Application for Review

Comes now Fred Elder, employe and respondent herein, and respectfully applies for a review of the arbitration decision and award herein, and prays that said arbitration decision and award be vacated and set aside; that the application for arbitration filed by the Chicago, Rock Island & Pacific Railway Company herein be dismissed, and in the alternative, that the hearing thereon be continued until the case pending in the District Court of Steele County, Minnesota, wherein Fred Elder is plaintiff and the Chicago, Rock Island & Pacific Railway Company is defendant can be tried and determined. In support of this application, this respondent respectfully assigns the following grounds therefor:

1. The Industrial Commissioner erred in overruling this respond-
[fol. 223] ent's plea in abatement and motion for continuance.

2. The Industrial Commissioner erred in proceeding in this matter without awaiting the determination and adjudication of the case pending in the District Court of Steele County, Minnesota, wherein Fred Elder is plaintiff and the Chicago, Rock Island & Pacific Railway Company is defendant.

3. The Industrial Commissioner erred in entertaining the application for arbitration herein, because respondent at the time of his injury was engaged in interstate Commerce, and the rights and liabilities of the parties hereto was governed by the Federal Employers' Liability Act, to the exclusion of the Iowa Workmen's Compensation Act.

4. The Deputy Industrial Commissioner, sitting as a board of arbitration, erred in not recognizing the action pending in the District Court of Steele County, Minnesota, and in proceeding with the hearing before such action could be determined.

5. The Deputy Industrial Commissioner erred in overruling respondent's motion for a continuance.

6. The Deputy Industrial Commissioner, sitting as a board of arbitration, erred in holding that the respondent was not engaged

in interstate commerce at the time of his injury, as the undisputed evidence showed that the respondent was at that time engaged in interstate commerce.

7. The Deputy Industrial Commissioner, sitting as a board of [fol. 224] arbitration, erred in holding that the respondent was not engaged in interstate commerce at the time of his injury, because the greater weight and preponderance of the evidence showed that the defendant at the time of his injury was engaged in interstate commerce.

8. There is not sufficient competent evidence in the record to warrant the making of the decision and award complained of.

9. The Industrial Commissioner and the Deputy Industrial Commissioner, sitting as a board of arbitration, acted without power, and in excess of their power, because the respondent was engaged in interstate commerce at the time of his injury, and they were therefore without jurisdiction of this controversy.

10. All proceedings herein are erroneous because respondent was engaged in interstate commerce at the time of his injury.

11. All the proceedings herein are without jurisdiction because respondent was engaged in interstate commerce at the time of his injury.

Davis & Michel, Lehmann, Seever & Hurlburt, Attorneys for Respondent.

[fol. 225] EXHIBIT NO. 13 TO DEFENDANT'S EXHIBIT "H"

Copy

February 20, 1924.

Davis & Michel, Attys., Metropolitan Bank Bldg., Minneapolis, Minnesota.

GENTLEMEN:

In re C., R. I. & P. Ry. Co. vs. Fred Elder

Please be advised that the review hearing in the above entitled case is scheduled to be had at this office, Tuesday, February 26th, at 10 A. M.

Very truly yours, Iowa Industrial Commissioner.

EXHIBIT NO. 14 TO DEFENDANT'S EXHIBIT "H"

Copy

February 20, 1920.

Chicago, Rock Island & Pacific Railway Co., United Bank Building, Des Moines, Iowa.

Attention Legal Department

GENTLEMEN:

In re C., R. I. & P. Ry. Co. vs. Fred Elder

Please be advised that the review hearing in the above entitled case is scheduled to be had at this office, Tuesday, February 26th, at 10 A. M.

Attorneys for Mr. Elder are being notified.

Very truly yours, Iowa Industrial Commissioner.

[fol. 226] EXHIBIT NO. 15 TO DEFENDANT'S EXHIBIT "H"

Copy

February 20, 1924.

Lehmann, Seevers & Harlburt, Attys., Flynn Building, Des Moines, Iowa.

Attention Mr. Seevers

DEAR SIR:

In re C., R. I. & P. Ry. Co. vs. Fred Elder

Please be advised that the review hearing in the above entitled case is scheduled to be had at this office, Tuesday, February 26th, at 10 A. M.

Very truly yours, Iowa Industrial Commissioner.

CERTIFICATE OF GOVERNOR

State of Iowa, Executive Department

To all to whom these presents shall come, Greeting:

I, N. E. Kendall, Governor of the State of Iowa and keeper of the great Seal thereof, do hereby certify that A. B. Funk is the duly appointed, qualified and acting Industrial Commissioner of the State of Iowa; that he is the custodian of the records pertaining to all causes heard and determined by the Industrial Commissioner and the Deputy Industrial Commissioner for Iowa, and is the proper [fol. 227] officer to certify to the proceedings and decisions in all

caused heard and determined by him or by the Deputy Industrial Commissioner; that the seal attached to the foregoing certificate is the official seal of the Industrial Commissioner of the State of Iowa; that the certification of the record by the said Industrial Commissioner hereto attached is in due form, as required by the laws of the State of Iowa.

In testimony whereof, I have hereunto affixed my signature and an impression of the Great Seal of the State of Iowa. Done at Des Moines, the Capital of the State, this twenty-third day of February, 1924.

N. E. Kendall, Governor. (Seal.)

STIPULATION RE SETTLED CASE

It is stipulated that the foregoing transcript of testimony consisting of one hundred and twenty-six (126) typewritten pages, together with all original exhibits introduced in evidence and on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1 to 8, inclusive, and Defendant's Exhibits "A" to "H" inclusive, may be by the Court, without notice, signed and allowed as and for the Settled Case herein.

Dated July 14, 1924.

Davis & Michel, Attorneys for Plaintiff. O'Brien, Horn, Stringer, Attorneys for Defendant.

[fol. 228] IN DISTRICT COURT OF STEELE COUNTY

ORDER SETTLING CASE—July 14, 1924

The foregoing transcript, consisting of one hundred and twenty-six (126) typewritten pages, having been by me examined and found conformable to the truth, said transcript, together with all original exhibits introduced in evidence and now on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1 to 8, inclusive and Defendant's Exhibits "A" to "H" inclusive, may be, and the same hereby is signed, settled and allowed as and for the Settled Case herein, as containing all testimony, offers, exhibits, objections, exceptions, motions and rulings, and all other proceedings had or taken at the trial of the above entitled action.

Fred W. Senn, District Judge.

[fol. 229] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

VERDICT

We, the jury empaneled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of $29,940—Twenty-nine Thousand, Nine Hundred Forty Dollars.

Dated at Owatonna, Minn., this 3rd day of March, A. D. 1924.

Andrew Christenson, Foreman.

[fol. 230] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

MOTION FOR JUDGMENT OR A NEW TRIAL

To Davis & Michel, E. S. Cary, and Leach & Leach, attorneys for plaintiff, and to said plaintiff:

SIRS: Please Take Notice, that the defendant moves the Court for an order directing the entry of judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury herein, and that plaintiff take nothing by this action, on the following grounds:

1. Because, upon the evidence as it stood at the time defendant's motion for a directed verdict in its favor was made, the defendant was entitled to such directed verdict.

2. Because it conclusively appeared from all of the testimony that plaintiff was at the time he sustained his injuries, not engaged [fol. 231] in interstate commerce, but was on the contrary, engaged in commerce wholly within the state of Iowa, and that the Federal Employers' Liability Act of the United States April 22nd, 1908, as amended, had and has no application to this case, and that the rights of the plaintiff and the defendant were and are governed solely by the Workmen's Compensation Act of the State of Iowa.

3. Because it conclusively appeared that the Industrial Commissioner of the State of Iowa, acting judicially and as a court under the powers granted to it by the Workmen's Compensation Act of the State of Iowa, had adjudged and decreed that plaintiff was not at the time of his injuries, engaged in interstate commerce, but that he was on the contrary engaged in commerce wholly within the state of Iowa, and that said Industrial Commissioner had awarded compensation to plaintiff for his said injuries under the Workmen's Compensation Act of the State of Iowa, and that said judgment of said Industrial Commissioner was, and is res judicata, and was and

is conclusive and binding upon this court under Section 1, of Article IV., of the Constitution of the United States.

You will further take notice, that if the Court should not grant, but on the contrary should deny said defendant's motion for judgment notwithstanding the verdict, then and in that event the defendant moves the court for an order vacating and setting aside the verdict of the jury herein, and for a new trial of this action, on the following grounds:

1. Because said verdict is not justified by the evidence.

[fol. 232] 2. Because said verdict is contrary to law.

3. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

4. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

5. Because of the following errors of law occurring at the trial, and herein specifically assigned, to-wit:

a. The court erred in refusing to direct a verdict in favor of the defendant and against the plaintiff.

b. The court erred in refusing to hold as a matter of law that plaintiff was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

c. The court erred in submitting to the jury the question of whether plaintiff was engaged in interstate commerce at the time of his injury.

d. The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "G," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa, for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties of this action.

e. The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "H," and in excluding said exhibit [fol. 233] from the evidence, said exhibit being an exemplified copy of the judgment of the Industrial Commissioner of the State of Iowa, whereby it was adjudged and decreed that plaintiff was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was, and is res judicata and binding upon this court under Section 1, Article IV., of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under the United States Constitution.

Said motion is made upon all the records and files in this cause, and upon a case to be settled and allowed by the Court.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minn.

Due and personal service of the within notice of motion is hereby admitted, this 30th day of April, 1924.

The hearing of said motion will be had at the time and place convenient and satisfactory to the Court and counsel, and to be agreed upon. Until the hearing of said motion, it is agreed that all proceedings herein be stayed.

Davis & Michel, Attorneys for Plaintiff.

[fol. 234] In District Court of Steele County

[Title omitted]

Order Denying Motion for Judgment or a New Trial

The above entitled matter came on for hearing before the court at Mantorville, Minnesota, on the 14th day of July, 1924, upon the motion of the defendant for an order setting aside the verdict of the jury herein and granting to the defendant judgment as against the plaintiff, or, in the alternative, for an order setting aside the verdict of the jury herein and granting to the defendant a new trial of said cause. O'Brien, Horn & Stringer, Esqs., St. Paul, Minn., appeared for the defendant in support of said motions, and Davis & Michel, E. S. Cary and Leach & Leach, Esqs., appeared for the plaintiff. The matter was submitted upon a settled case herein, upon all the records and files in said cause and upon the oral arguments and briefs of counsel. After due consideration,

It is ordered that said motions be and the same are in all things denied.

Fred W. Senn, District Judge.

[fol. 235] In District Court of Steele County

Memorandum

This action is brought under the Federal Employers' Liability Act. The plaintiff was a brakeman working with a switching crew on defendant's railway, engaged in hauling cars in and out of the coal mines near Pershing siding, Iowa. It was the duty of this crew to place loaded cars for shipment upon the tracks at Pershing siding in such order that each east bound or west bound trains might pick them up and carry them to their destination. At noon on the day of the accident, the switching crew was given permission to proceed

to Chariton, Iowa, for dinner and for water over the main line of the defendant railroad. After going onto the main line at Pershing siding the work train was struck by a thru passenger train from Minneapolis to Kansas City going in the same direction. The coboose of the work train was demolished and plaintiff was seriously injured.

The defendant upon the trial of the case admitted that its negligence was the direct and proximate cause of the plaintiff's injury. The work train was given the use of the main line to proceed to Chariton at a time when a thru passenger train had the right of way.

The Court submitted to the jury the question as to whether plaintiff and defendant at the time of the collision were engaged in interstate commerce, and if they were so engaged then the question of the amount of damages that plaintiff is entitled to recover.

It appears that jury prior to the collision plaintiff was engaged in [fol. 236] moving loaded cars for interstate shipment. The jury found that plaintiff and defendant were as a matter of fact engaged in interstate commerce and returned a verdict for the plaintiff.

The instant case was started on October 30, 1923. Thereafter and on January 5, 1924, the defendant company instituted proceedings before the Industrial Commission of the State of Iowa, which determined the character of plaintiff's employment and made an award of $15,000 per week during the period of his total disability to be paid to him by the defendant.

The defendant now claims that the plaintiff, Elder, is barred from making any recovery because an award has been made in his favor by the Industrial Commission of the State of Iowa; that the Iowa tribunal's determination that plaintiff was engaged in interstate commerce is binding upon this Court and that the order of the Industrial Commission is res judicata.

This contention of the defendant cannot be sustained. The Court takes the view that the Federal law supersedes all state laws, rules or regulations governing the same subject.

Cases cited by counsel for plaintiff are in point.

Seaboard Air Line Co. v. Horton, 233 U. S. 492.
Employers' Liability Cases, 223 U. S. 1.
Erie Ry. Co. v. Winfield, 244 U. S. 170.
New York Ry. Co. v. Winfield, 244 U. S. 147.

I think the claims of estoppel and res judicata as made by the defendant are disposed of by the cases of

Troxell v. D. L. & W. R. Co., 227 U. S. 434.
St. L. I. M. & S. R. Co. v. Hesterly, 228 U. S. 700.
[fol. 237] Philadelphia & R. R. Co. v. Hancock, 253 U. S. 284.

The proceedings before the Industrial Commission in Iowa were instituted by the defendant. The plaintiff objected to those proceedings. The plaintiff, and not the defendant, had the election how the suit should be brought. To permit the defendant to institute proceedings in its own way in a State tribunal under a State law and to do so even after plaintiff has instituted his action

would defeat the object and the purpose of the Federal Act. Evidently the defendant took steps to accomplish that result.

The plaintiff and defendant were engaged in interstate commerce under the claim of plaintiff and was entitled to have such question submitted to the court and jury and the Industrial Commission was without authority to make an order which is conclusive upon this court and which will defeat a right given to the plaintiff by Congress.

Upon the question of liability there is no defense. The injury sustained by the plaintiff was serious and is permanent. Damages do not appear excessive and counsel for the defendant does not strongly urge the return of excessive damages by the jury's verdict.

The exhibits of the defendant were properly rejected by the court and the verdict will stand.

Senn.

[fol. 238] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

JUDGMENT—September 18, 1925

This cause having been regularly placed upon the Calendar of the above named Court for the December A. D. 1923, Regular Term thereof, came on for trial before the Court and a Jury duly empanelled and sworn to try the same on the First day of March A. D. 1924, which said Jury did on the Third day of March A. D. 1924, duly render a verdict herein which, in substances, follows:

"We, the jury empanelled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of $29,940—Twenty-nine Thousand, Nine Hundred Forty Dollars.

Dated at Owatonna, Minn., this 3rd day of March A. D. 1924.

Andrew Christenson, Foreman."

Now, pursuant to said verdict and on motion of Ernest A. Michel, one of the Attorneys for Plaintiff it is hereby adjudged that the Plaintiff recover of the Defendant and each of them the sum of [fol. 239] ($30,913.05) Thirty Thousand, Nine Hundred and 05-100 Dollars, the amount of said Verdict and interest to date hereof, together with ($116.25) One Hundred Sixteen and 25-100 Dollars cost and disbursements, as taxed and allowed, amounting in all to the sum of ($31,029.30) Thirty-one Thousand, Twenty-nine and 30-100 Dollars.

By the Court.

Bernard McGovern. Clerk District Court. (Court Seal.)

IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

NOTICE OF APPEAL

To Messrs. Davis & Michel, attorneys for plaintiff, and to Bernard McGovern, Esq., clerk of the District Court of Steele County, Minnesota.

SIRS: Please take notice, that the above named defendant appeals to the Supreme Court of the State of Minnesota, from the judg-
[fol. 240] ment in the above entitled action, entered and docketed on September 18, 1924, by which it was adjudged and decreed that plaintiff recover of the defendant the sum of Thirty-one Thousand, Twenty-nine and 30-100ths ($31,029.30) Dollars. Said appeal is from the whole of said judgment, and from each and every part thereof.

Respectfully, O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the above Notice of Appeal is hereby admitted, this 22nd day of September, 1924.

Davis & Michel, Attorneys for Plaintiff.

Due and personal service of the above Notice of Appeal is hereby admitted, this 26 day of September, 1924.

Bernard McGovern, Clerk District Court, Steele County, Minnesota.

[fols. 241-244] BOND ON APPEAL FOR $35,000—Approved; omitted in printing

---

[fol. 245] IN SUPREME COURT OF MINNESOTA

FRED A. ELDER, Respondent,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant

ASSIGNMENTS OF ERROR

The court erred:

1. In refusing to direct a verdict in favor of defendant and against plaintiff.

2. In refusing to hold, as a matter of law, that plaintiff was not at the time of his injury engaged in Interstate commerce and in re-

fusing to hold that he was on the contrary engaged in commerce wholly within the state of Iowa, and in holding this to be a question of fact for the jury.

3. In refusing to hold that the judgment of Industrial Commis- [fol. 246] sioner of Iowa, by which it was adjudged that plaintiff was not engaged in interstate commerce was res judicata and binding and conclusive upon the court and the plaintiff herein, thereby refusing to give full faith and credit to the judgment of the Iowa tribunal contrary to Section 1 of Article 4 of the Constitution of the United States, and denying to the defendant its constitutional rights thereunder.

4. In denying the defendant's motion for judgment in its favor notwithstanding the verdict of the jury against it.

5. In denying defendant's motion to set aside the verdict and for a new trial of this action.

A. Because said verdict was not justified by the evidence.

B. Because said verdict was contrary to law.

C. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

D. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

E. Because of the following errors of law occurring at the trial and herein specifically assigned, to-wit:

(a) The court erred in refusing to direct a verdict in favor of the defendant, and against the plaintiff.

(b) The court erred in refusing to hold as a matter of law, that [fol. 247] plaintiff was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

(c) The court erred in submitting to the jury the question of whether plaintiff was engaged in interstate commerce at the time of his injuries.

(d) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "G", and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa; for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties to this action.

(e) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "H", and in excluding said exhibit from the evidence, said Exhibit being an exemplified copy of the judgment of the Industrial Commissioner of Iowa, whereby it

was adjudged and decreed that plaintiff was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was and is res judicata and binding upon this court under Section 1, of Article IV, of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under said United States Constitution.

[fol. 248] 6. In entering judgment in favor of plaintiff and against defendant, thereby violating Section 1, of Article IV, of the Constitution of the United States, and depriving this defendant of its constitutional rights under said section and article of the constitution.

[fol. 249] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

[Title omitted]

OPINION—Filed June 19, 1925

Syllabus

1. The evidence sustains a finding of the jury that the plaintiff was employed in interstate commerce at the time of his injury.

2. The plaintiff's cause of action was not barred by an award in a compensation proceeding instituted by the defendant in the state where the accident occurred.

3. The verdict is not excessive.

Judgment affirmed.

Opinion

Action under the Federal Employers' Liability Act to recover for [fol. 250] personal injuries. There was a verdict for the plaintiff. The defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. Judgment was entered on the verdict. The defendant appeals from the judgment.

1. The plaintiff was injured in the accident considered in Schendel, administrator, against the same defendant, — Minn. —, — N. W. —. He was the brakeman who set the brakes on the interstate cars, in the sidetrack at Pershing. That was the last work done on the cars brought from the mine on the day of the accident. The facts relative to the day's work are sufficiently stated in the Schendel case. The facts characterizing the intestate there, and the plaintiffs here, as employed in interstate commerce are different; but here as there the question was at least for the jury.

2. The action was brought on October 30, 1923. On January 5, 1924, the defendant instituted proceedings under the compensation act of Iowa against the plaintiff to have determined his compensation. The plaintiff here, defendant in that proceeding, filed a plea in which he alleged the pendency of the action commenced in Minnesota and claimed a right under the Federal Employers' Liability Act. On February 4, 1924, the plea was overruled. The deputy industrial commissioner on February 13, 1924, made an award to the plaintiff here of $15 per week during the period of total disability which was left undetermined, and this award was pleaded as a bar by supplemental answer. The action came on for hearing on March 1, 1924, [fol. 251] and the verdict was returned on March 3, 1924. If the conclusion reached in the Schendel case is correct the award is not a bar. The compensation proceeding went no farther than a finding by the deputy commissioner, which was the equivalent of a finding by the arbitration committee. In view of the Schendel case we engage in no further discussion.

3. The defendant insists that the verdict, which was for $29,940, is excessive. Plaintiff was 38 years old. He earned from $240 to $250 per month. He was badly burned, some ribs were broken, he suffered a concussion of the brain, and was unconscious for a few days. There was an injury to the spinal cord. There is testimony that he will never be able to do manual work again—at least heavy work. He is deformed and still suffers.

The verdict is not excessive. Injuries are usually not quite alike nor are other elements entering into a proper award of damages, such as age, life expectancy, earning capacity, pain and suffering, from the combination of which the award must be estimated in a sensible way, just the same. Damages awarded and sustained in other cases are of value for illustration, but usually not at all controlling. Whitehead v. Wisconsin, &c. R. Co., 103 Minn. 13; Clay v. Chicago &c. R. Co., 104 Minn. 1; Sprague v. Wisconsin Cent. R. Co., 104 Minn. 58; McMahon v. Illinois Cent. R. Co., 127 Minn. 1.

Judgment affirmed.

Mr. Justice Stone took no part.

[fol. 252] IN SUPREME COURT OF MINNESOTA

[Title omitted]

PETITION FOR STAY

The above named appellant, feeling itself aggrieved by the order for judgment of this Court herein, by which this Court did order judgment affirming in all things the judgment of the Court below, and desiring to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this Court, when entered, does hereby pray that the Court do enter its order staying

all proceedings herein and during the pendency of such petition for a writ of certiorari to said United States Supreme Court.

The Chicago, Rock Island & Pacific Railway Company, by O'Brien, Horn & Stringer, Its Attorneys.

[fol. 253] IN SUPREME COURT OF MINNESOTA

ORDER OF STAY—June 22, 1925

Upon application of the above named appellant:

It is ordered, that upon and after the entry of final judgment herein affirming the judgment of the Court below, all proceedings herein in this Court and in the District Court of Steele County, Minnesota, including the issuance of any writ of execution out of either Court and the issuance of any remittitur from this Court to the Court below, be and hereby are in all things stayed pending the petition of the appellant for a writ of certiorari to the United States Supreme Court.

Homer B. Dibbell, Justice.

[fol. 254] IN SUPREME COURT OF MINNESOTA

[Title omitted]

JUDGMENT—Filed June 30, 1925

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Steele, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that Respondent herein, do have and recover of Appellant herein the sum and amount of Sixty-four Dollars ($64.00), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 30th, A. D. 1925.

By the Court.

Attest.

Grace F. Kaercher, Clerk.

[fol. 255] Statement for Judgment

Statutory costs, $25.00; Printer, $39.00; Total, $64.00.

[File endorsement omitted.]

[fol. 256] IN SUPREME COURT OF MINNESOTA

[Title omitted]

CLERK'S CERTIFICATE

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota do hereby certify that the foregoing consisting of 255 numbered pages, is a true and complete transcript of the record on appeal to this court, comprising the record on appeal from the District Court of the Fifth Judicial District in and for Steele County, Minnesota, to this court, together with all proceedings in said cause in this court, including the opinion of the court thereon and the final judgment of this court on said appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of this court, this 27 day of July, 1925.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

[fol. 257] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8354)